Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

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October 9, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNE-SOTA, a Minnesota corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

The Petitioner, FRANCIS M. COCKE, respectfully prays that a Writ of Certiorari issue to review the Order of the Arizona Court of Appeals entered in 1 CA-CIV 2970 (Maricopa County Superior Court No. C-222472), on February 24, 1975.

OPINIONS AND JUDGMENTS BELOW

AND

JURISDICTION

The February 24, 1975 Order of the Court of Appeals dismissing petitioner's appeal and imposing sanctions is at page 542 of Volume VI of the Appendix hereto.

Petitioner's timely motion for rehearing in the Court of Appeals (A. 552) was denied May 16, 1975 (A. 592). His timely petition to the Arizona Supreme Court for review was denied without opinion (Justice Struckmeyer voting to review) on June 18, 1975 (A. 596).

Petitioner's timely motion (A. 598) for rehearing on the Arizona Supreme Court's Order denying review was denied without opinion (Justices Lockwood and Hays not participating) on July 15, 1975 (A. 604).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

Federal rights were claimed in C-222472, in the trial and appellate courts. See Appendix at pages 279, 280; 302-304; 398-400; 437; 467, 468; 550, 551; 560, 561.

The federal claims were not discussed or directly ruled on by the state courts.

QUESTIONS PRESENTED

Whether under the United States Constitution and laws a state court is without subject matter jurisdiction (1) to remake valid written agreements and enforce them as remade, (2) to bind by judgment and execution a real party in interest where not joined in the proceedings, and (3) to enter and enforce judgment without findings or conclusions on undisputed documentary evidence presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE (1970)

UNITED STATES CONSTITUTION

Article I, Sections 1 & 8 (last clause):

Section 1 (Vol. 1, p. XLIII): All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8, last clause (Vol. 1, p. XLV) is quoted infra at page 26.

Article IV, Sections 1 & 2 (first clause):

Section 1 (Vol. 1, p. XLVII): Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2, first clause (Vol. 1, p. XLVII): The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article VI (Vol. 1, p. XLVII):

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall every be required as a Qualification to any office or public Trust under the United States.

Amendment V (Vol. 1, p. XLVIII):

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Sections 1 & 5:

Section 1 (Vol. 1, p. XLIX): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 (Vol. 1, p. L): The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, TITLE 42:

Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1983. Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985(3). If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or

Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Section 1988. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all person in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found quilty.

STATEMENT OF THE CASE

This action arose out of disputes over the terms and conditions contained in a written escrow agreement for the sale and purchase of land (A. 54-80).

Certain land owned by petitioner (F. M. Cocke) and other land held in trust was agreed to be sold under the terms of the agreement to Respondent James Stewart Company, or its nominee, the Respondents Horne (hereinafter referred to as "Buyers"). Respondent Transamerica Title assumed the duties of escrow agent and title insurer under the agreement, dated October 9, 1968.

Petitioner deposited into escrow executed warranty deeds (A. 272) for the land to be conveyed by him as well as executed releases of mortgage (A. 276) tendered by the Buyers. Petitioner performed all duties agreed to, but refused to execute deeds for acreage designated as Parcels 1A and 2A, as demanded in writing by the Buyers. This land had been expressly excepted from the transaction, and was not the subject of any contract.

On March 5, 1969, the petitioner filed a 13-day notice of intent to cancel, as provided for by the escrow agreement, upon the continued failure of the Buyers to comply with the terms and conditions of the escrow agreement by depositing the required amounts of money and mortgages. On March 7, 1969, the Buyers tendered two personal checks, unacceptable under the terms of the agreement, and drawn on an out-of-state bank, to cover part of the admitted deficiency in the mortgages deposited by Buyers (A. 91).

On April 22, 1969, the Buyers' deposit into escrow of funds and mortgages was still at least $64,000.00 short of the amount required by the terms of the escrow agreement. On that date, Buyers brought a civil action in Maricopa County, Arizona, Superior Court, Cause number C-222472, against the named Sellers, Francis M. Cocke and Joan H. Cocke, divorced, for specific performance of the terms of the agreement. Transamerica, holder in escrow of the deeds, money, mortgages and mortgage releases, refused to issue title insurance and refused to deliver or to redeliver the deeds, but was never named by Buyers as a party defendant.

F. M. Cocke brought an affirmative action jointly as well as severally against

all three of the other parties. The trial court judge severed the action into three separate actions, and entered separate and independent judgments against F. M. Cocke and in favor of each of the other parties (A. 102, 106, 110 & 116). Each of these judgments altered the agreement of the parties.

Relief is sought herein from these three state court judgments, and the orders issued in execution under one of them, on the grounds that these judgments and orders:

(1) fundamentally alter, and would enforce as so altered, the four-party escrow agreement for the sale and purchase of land;

(2) were based on the asserted power of the state court to bind by judgment a real party in interest, and thus an indispensable party, but not joined in the action, resulting from the state court's splitting of petitioner's affirmative action to enforce the indivisible contract into three separate and independent actions, with separate and independent proceedings and judgments; and

(3) were entered without findings on undisputed documentary evidence presented, which evidence shows that the actual agreement entered into was repudiated, or cancelled under its own specific cancellation provisions, before the litigation over it began.

It is petitioner's position that these judgments and orders were entered without jurisdiction in the court over the subject matter, on each of the above three grounds,

which are designated ALTERATION OF CONTRACT, INDISPENSABLE PARTIES, and WANT OF FINDINGS.

It is also petitioner's position that the entry of such judgments and orders has deprived petitioner of due process of law, as secured to him and as protected by the United States Constitution and laws, including the 14th Amendment and Title 42 U.S.C. Sections 1981-1988.

1. ALTERATION OF CONTRACTS

The escrow agreement (A. 54-80) provided that the Buyer was to pay, in addition to the payment of other sums and the deposit of mortgages, as the first annual installment on the mortgages $64,000.00 on January 2, 1969. As provided for in the agreement by its cancellation paragraphs 16, 17 and 18 (A. 62), on March 6, 1969 escrow agent Transamerica gave written notice to Buyer that to avoid cancellation it must comply with the terms of the agreement by March 19, 1969 (A. 90).

The September 27, 1972 judgment in favor of the Buyers (A. 116) altered such 13-day period of grace by adding thereto some four years and eight months, allowing the Buyers to comply with the agreement by November 27, 1973, one year after expiration of the 60-day period for appeal. The last three paragraphs of Buyers' judgment of September 27, 1972 (A. 128) are quoted here:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of

the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the plaintiffs' compliance with the terms of said contract as modified hereby."

(emphasis added)

As to the validity and consequent finality of judgments which alter agreements, in Goodman v. Newzona, 101 Ariz. 470, 421 P.2d 318 (1967), the court stated the universal rule:

"* * *It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement.* * *

> "It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh." * * *

Brandt v. Brandt (1953) 76 Ariz. 154, 261 P.2d 978, held that the statute of limitations does not bar an attack upon a void judgment, but that it may be attacked anywhere and at any time, and quoted with approval Brecht v. Hammons (1929) 35 Ariz. 383, 278 P. 381, 382:

> "Three things must concur or a judgment is void upon its face, and may be attacked at any time. The Court must have (a) jurisdiction of the subject-matter of the case, (b) jurisdiction of the persons involved in the litigation, and (c) jurisdiction to render the particular judgment given."

The court was plainly without jurisdiction to render judgments which altered the agreement of the parties.

The trial court's modification of the contract was in contravention of the Constitution and laws made in pursuance thereof and this Court's proceedings.

2. INDISPENSABLE PARTIES

As previously stated, Transamerica was never joined in the Buyers' suit for specific performance. Transamerica refused to deliver petitioner's deeds to the Buyers, and they successfully petitioned the trial court for an order granting a writ of

assistance. The Order Granting Writ and the Writ itself (A. 146, 153) entered October 31, 1973, and issued solely under Buyers' judgment, were directed to Transamerica and to Minnesota Title as substituted for Transamerica with all its rights, privileges and duties (A. 149), contrary to the law announced in Terrell v. Allison, 21 Wall. (80 U.S.) 289 (1875).

Terrell stated the rule that a writ of assistance can only issue against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree. See also Howard v. Milwaukee & St. Paul R. Co., 101 U.S. 837 (1880), citing and following Terrell.

Terrell also stated the long-standing rule that the jurisdiction of a court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties. This would leave the court without subject-matter jurisdiction where without power to enforce its judgment or decree. For this rule see also Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, 156, cert. den. (1972) 406 U.S. 945.

These same rules apply to all the separate and independent proceedings held and judgments entered following the splitting of F. M. Cocke's affirmative action into three separate actions. See Louisville and Nashville Railroad Co. v. Ide, 114 U.S. 52, 55-57 (1885), and St. Louis and San Francisco Railway Co. v. Wilson, 114 U.S. 60, 62 (1885), on splitting of multi-party actions by the attempted removal of parts thereof to federal court on the grounds of diversity. See also Arizona

and Federal Rules of Civil Procedure, Rules 17 and 19; Mosher v. Hiner, 62 Ariz. 110, 154 P.2d 373 (1944), cert. den. 325 U.S. 874.

That Transamerica was an indispensable party is easily shown. After the trial court severed the action, granted summary judgment in favor of Transamerica, and entered an interlocutory summary judgment in favor of Buyers, the Buyers and Transamerica agreed that additional deposit of funds with Transamerica was necessary to bring the Buyers into compliance with the four-party escrow agreement (A. 96). Subsequently, Transamerica and the Buyers acknowledged that still more funds must be deposited with Transamerica before the Buyers would be in compliance (A. 99, 100).

From the beginning the Buyers sought specific performance by F. M. Cocke of the duties plainly delegated to and assumed by Transamerica. The issuance of title insurance, the closing of escrow and the delivery of the deeds were totally under the control of Transamerica. The trial court judge in the September 27, 1972 judgment granting the relief sought by Buyers ordered F. M. Cocke to "perform all obligations necessary", without finding what oligation he had assumed and then failed to perform, but conditioned such performance, and the judgment, on Buyers' compliance with the agreement.

Throughout the life of the case, it has been alleged that F. M. Cocke had failed to perform the contract by refusing to execute documents but never has there been a finding as to what required documents F. M. Cocke refused to execute and, virtually every pleading, motion, holding and judgment arising out of or related to these facts is based on this one unfounded

conclusion.

Nearly a year after entry of the September 27, 1972 judgment, Buyers petitioned for a writ of assistance ordering Transamerica to perform or for certain alternative relief. The court was without jurisdiction over Transamerica, was without jurisdiction to enforce a judgment requiring action by a party not joined, and the judgment was void on its face. Earle v. McVeigh 91 U.S. 503, 507 (1876); Brandt v. Brandt, supra; Preston v. Denkins, 94 Ariz. 214, 383 P.2d 686 (1963). The trial court's severance of the action and failure to join indispensable parties was in contravention of the Constitution and laws made in pursuance thereof and this Court's proceedings.

3. WANT OF FINDINGS

In an equity case, it is the duty of the court to make meticulous findings. U.S. v. Aluminum Co. of America, D.C.N.Y. (1941), 44 F.Supp. 97, cause certified and transferred 322 U.S. 716, affirmed in part and reversed in part on other grounds, 148 F.2d 416. See 28 USCA (1971), Rule 52, Note 31, Duty and Function of Court, page 29.

Petitioner timely filed three requests for findings and conclusions pursuant to Rule 52 (A. 281, 341, 345) and filed objections to Buyers' Amended Proposed Findings and Conclusions and Second Amended Judgment (A. 347). As the sum and substance of the requests and objections, petitioner sought findings as to:

1. By what specific act, or failure to act, had F. M. Cocke failed or refused to perform.

2. Whether or not the Buyers had, in fact, complied with the terms and conditions of the escrow agreement as made by the parties to the agreement.

In none of the separate and independent judgments, in favor of Buyers, or Transamerica, or John Cocke, nor in the trial court judge's orders based thereon, was there ever any finding as to petitioner's specific failure to perform or as to Buyers actual performance. The only findings in September 1972 pertaining to performance was "Cocke has refused to convey the property to Stewart or to the Hornes" and "Plaintiffs have been ready at all times to close this transaction. . .". Readiness, willingness and ability are not material to actual performance. See 28 Am Jur 2d, Escrow, Sections 21, 22, 24; 30A CJS Escrows, Sections 10(a), 10(b), and cases cited.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 368, 369 (1936), the court said:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In United States v. Aluminum Co. of America, 2 F.R.D. 224, 231 (1941), the District Court S.D. New York said:

> "Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same

terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608, 609, 19 S.Ct. 761, 43 L.ed 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 40 S.Ct. 144, 73 L.ed 243. See In re G. W. Giannini, Inc., 2 Cir., 90 F.2d 445, 447, 111 A.L.R. 1492. . . . For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that, in order to obey the rule, as construed by the Supreme Court--regardless of the contents of the oral opinion--findings must be made and conclusions stated on all issues in the present case."

Plainly, the failure or refusal to make findings was a deprivation of petitioner's right to due process, in contravention of the Constitution, laws made in pursuance thereof and this Court's proceedings.

BUYERS' CONDITIONAL JUDGMENT

The judgment entered on September 27, 1972 was conditional, and so interlocutory, on its face. In the next to the last paragraph of the judgment, supra, page 12, the ordered performance by F. M. Cocke is conditioned upon compliance by plaintiff Buyers with the terms of the original contract of October 9, 1968. In the last paragraph the force and effect of the judgment is specifically subjected to, or conditioned on, the plaintiff Buyers' compliance with the terms of the contract "as modified hereby."

It is well settled that a judgment which conditions its force and effect on

the performance of certain acts to be done in the future by the parties, as here, remains without force or effect unless and until the conditions are fulfilled. Federal Land Bank of Louisville, Ky., v. Roney, 139 F.2d 175 (7th Cir. 1944), cert. den., 322 U.S. 753, rehearing denied, 323 U.S. 810, held that:

> "* * *A judgment which will not become effective unless certain conditions are complied with, or which may be defeated or amended by performance of a condition subsequent, is no bar to a second action on the same subject matter unless it has become absolute by a performance of the conditions in the one case, or failure to perform in the other* * *."

The fulfillment of the condition specified by the judgment in its last paragraph is itself conditioned on the asserted power or jurisdiction of the court to "modify" the agreement by allowing the extra four years and eight months for the Buyers to comply, which power or jurisdiction it did not and does not have. The relief of alteration of the escrow agreement was not relief which could be granted. Goodman v. Newzona Investment Co., supra.

After entry of the conditional judgment, petitioner filed a Motion To Vacate (A. 368) on the ground of lack of subject matter jurisdiction, which was denied. An appeal was filed within 60 days of the denial of the motion and was dismissed as "untimely".

F. M. Cocke then filed a Motion for Findings of grounds (A. 434) upon which

the appeal was held untimely. Petitioner sought a Court of Appeals ruling on whether the untimeliness was because (i) the Motion To Vacate was not deemed a motion to alter or amend and therefore did not extend the time for appeal (FRCP 59(e), Arizona Rules of Civil Procedure 59(l)), or (ii) on the plain fact, earlier called to the court's attention (A. 431), that the judgment was conditional and therefore not appealable until a final judgment was entered (Arizona Revised Statutes, 12-2101). The motion for findings was later denied and the court did not reach the merits of the questions presented in that 1973 appeal:

> "WHETHER THE SUMMARY JUDGMENTS DATED NOVEMBER 10, 1970, IN FAVOR OF TRANSAMERICA, IN THEIR ORIGINAL FORM AND AS MODIFIED BY THE ORDER DATED NOVEMBER 6, 1972, AND THE SUMMARY JUDGMENT DATED SEPTEMBER 27, 1972, IN FAVOR OF BUYERS, WERE AND ARE VOID FOR WANT OF JURISDICTION."

F. M. Cocke's earlier appeal from Transamerica's summary judgment entered November 10, 1970 is reported as Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756 (1972).

Final judgment on the Buyers' action was entered on September 30, 1974 (A. 165).

On November 27, 1974 F. M. Cocke filed notice of appeal (A. 497) from the September 30, 1974 order and judgment and all orders, judgments and rulings entered in C-222472.

The Buyers and Title Insurance Company of Minnesota, a Minnesota corporation, as

an officer of the court, filed a motion to dismiss the appeal and impose sanctions in the form of attorney fees (A. 501), as did also Transamerica (A. 531).

In timely responses (A. 513, 547) to these motions, F. M. Cocke pointed to the issues, raised by claims of res judicata, of the lack of jurisdiction of the lower court to alter the escrow agreement, to bind by judgment a party in interest but not joined in the action as an indispensable party, and to enter judgment without findings and conclusions on documentary evidence presented, as well as the issues of Buyers' conditional judgment. All of these issues go to the validity and consequent finality of the judgments and orders appealed from as well as to the federal question of the denial of due process.

However, the Court of Appeals' Order, entered February 24, 1975 (A. 542) dismissed the appeal and imposed sanctions in the amount sought on the stated grounds that no issues of any substance were raised by the appeal, that it was taken solely for delay, and was completely frivolous. F. M. Cocke's opening brief was filed March 10, 1975.

The threshold questions of the lower court's jurisdiction to alter contracts, enter judgment in the absence of indispensable parties and without findings to support the judgment were never reached by the appellate court.

It is a fundamental principle that if jurisdiction is lacking the trial court should on its own motion decline to proceed, and the jurisdiction of the appellate

court on review is limited to correcting the error of the trial court in entertaining the action. United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 80 L.Ed. 1263 (1936); Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F.2d 514; Riley v. County of Cochise, 10 Ariz. App. 55, 455 P.2d 1005 1969); Quiroz v. Alfaro, 18 Ariz. App. 173, 500 P.2d 1161 (1972). See Federal Rules of Civil Procedure 17(a), 19, 52, 56, 12(b)(1,6,7), 12(h)(2,3); Arizona Rules of Civil Procedure, 16 ARS.

Petitioner has been denied fundamental rights guaranteed him by the Constitution and laws made in pursuance thereof and this Court's proceedings.

REASONS FOR GRANTING THE WRIT

Fairly comprised in the Questions Presented For Review is a substantial federal question involving every citizen's right in state court civil actions to the protection of the Constitution and laws made in pursuance thereof and this Court's proceedings.

WHETHER A CIVIL JUDGMENT WHICH INCLUDES OR IS PREDICATED ON THE DEPRIVATION OF A FEDERAL RIGHT CAN BE CARRIED INTO EXECUTION AS DUE PROCESS, OR IS VOID.

The question presented is the threshold question necessary for a determination of remedy and procedure for the vindication of the deprivation of any right, privilege or immunity secured or protected by the Constitution, laws and proceedings of this

Court and arising directly out of state court litigation of civil matters.

Answers to the question have been implied by the Court in multiple proceedings, and are clearly arguable from a logical analysis of the Constitution and laws, but it appears that the question has never been answered by a specific pronouncement of this Court.

In proceedings in recent years there has been an apparent return to many of the fundamental principles adhered to in the post-14th Amendment period, and the Court recognizes that the power to make civil and criminal laws in pursuance of the Constitution, and the power to alter or suspend, even momentarily, the effect of such laws, is vested in the Congress, not the courts or judges, state or federal.

In Scheuer v. Rhodes, 416 U.S. 232, 237 (quoting Ex parte Young, 209 U.S. 123, (1908)), the court affirmed its 1908 ruling that when a State judge acts under State law in a manner violative of the Federal Constitution, he is in that case stripped of his official character and personally subjected to the consequences of his individual conduct.

In Alyeska Pipeline Service Co. v. Wilderness Society, U.S. , 44 L.Ed.2d 141, 161, 95 S.Ct. 1612, 1628 (May, 1975), the Court said:

> "It is not for us to invade the legislature's province* * *".

It cannot be seriously denied that state court litigants, both civil and criminal, are from time to time denied,

either willfully or negligently, protection of the laws of the United States, laws by which the judges in every state are bound.

In Lee v. Florida, 392 U.S. 378, 386 (1968), the Court, pointing to Article VI of the Constitution, said:

> "Under our constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States, laws by which' the judges in every State (are) bound* * *."

Of course, if such a case involves criminal litigants, relief is readily at hand and frequently depends on little more than a mechanical selection of remedy based upon and conditioned by facts and procedure. The deprivation of a criminal litigant's federal right to due process is readily vindicated under the Constitution and this Court's decisions, whether the deprivation be willfull or negligent.

The 14th Amendment (1868), secured the right to "due process of law" for the protection of persons and property to all persons, and although not spelling out what the phrase "due process" meant, specifically gave Congress the power to enforce the amendment's provisions by appropriate legislation, in its Section 5.

By enacting 42 U.S.C. Section 1981 in the year 1870, some two years after the adoption of the 14th Amendment, Congress secured the right to make and enforce contracts, and to due process of law in the courts (by specifying what constitutes such due process), to all persons within the jurisdiction of the United States, so

forming but a single class, all members of which have these rights, as intended by the 14th Amendment. No distinction was made between those persons, civil litigants, and those persons, criminal litigants.

In the year 1885, in Barbier v. Connelly, 113 U.S. 27, 31 (quoted and followed in Truax v. Corrigan, 257 U.S. 312, 334 (1921)), the court said:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, * * *that all persons* * *should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; * * *."

A state court civil judgment including or predicated on the deprivation of a federal right, if pronounced to be one which can be carried into execution as due process, precludes any collateral attack on the judgment and any remedy against one taking under the judgment. That is, if such a judgment can be carried into execution, then the state court's jurisdiction and proceedings continue "until that judgment shall be satisfied." Hamilton v. Nakai, 453 F.2d 152, 156 (9th Cir., 1972) cert. den. 406 U.S. 945. On the other hand, if such a judgment is pronounced to be voidable, void or otherwise incapable of execution, the state civil litigant deprived of his federal rights may finally find himself

to be one of the class of all persons protected by the Constitution. It would appear that the state court would be divested of subject matter jurisdiction at the point of deprivation of federal right and that further proceedings would necessarily be void. Hamilton v. Nakai, supra; Earle v. McVeigh, 91 U.S. 503, 507 (1876). The invalidity of the state court proceedings could be shown prior to satisfaction of the judgment, and equitable relief could be sought to prevent a taking under a void judgment. As to the judiciary: the determination of the comprised question establishes a threshold for the enforcement and vindication of a civil litigant's rights under the provisions of Title 42 U.S.C. Sections 1981-1988, in the face of the "judicially fashioned doctrine" of judicial immunity. See O'Shea v. Littleton, 414 U.S. 488, 503 (1974).

The question of judicial immunity is not raised in the context of this petition but is directly raised in a companion Petition for Certiorari, arising from the same state trial court litigation and allowed to be docketed by this Court on June 6, 1975 (74-1532). The discussion presented here in that regard is respectfully submitted in order to point out the breadth of the comprised question, its importance to the judiciary, and to all persons, whether citizens or within the jurisdiction of the United States, and the far-reaching effect of the answer to it.

The last clause of Article I, Section 8, of the Constitution states:

> "The congress shall have power * * *To make all Laws which shall be necessary and proper for

carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Plainly, under this provision and Articles IV and VI of the Constitution, no court, state or federal, or a judge thereof, has the power to carry into execution, and so into effect, any judgment which would alter or suspend even momentarily any provision of a law made in pursuance of the Constitution, absent action of Congress.

Congress has made laws necessary and proper for assuring that any citizen of the United States or person within its jurisdiction, who is deprived of any rights, privileges or immunities, has a federal remedy at law or in equity (42 U.S.C. 1981-1988).

This court announced in O'Shea v. Littleton, supra, that a judge who willfully deprived a citizen of his Constitutional rights was deterred by the provisions of 18 U.S.C. Section 242. It is a historic maxim of the law that for every wrong there is a remedy. It is respectfully submitted that Congress intended to and did provide a remedy as well as a deterrent, and that state court litigants suffer from both willful and negligent deprivations of federal rights. The criminal litigant who has been deprived negligently of a federal right is vindicated just as surely as one who has been deprived willfully. No distinction was made in the Fourteenth Amendment between a willful deprivation of right and a negligent deprivation of right. So too

did Congress intend that the civil litigant be vindicated.

The answer to the comprised question establishes the pale of the judicial role in the context of the doctrine of judicial immunity.

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by (the) Constitution, the subject is necessarily one for judicial inquiry* * *." Scheuer v. Rhodes, supra.

The imperative of judicial integrity would seem to suggest that the comprised question be considered, that a definitive answer be given and that the state civil litigant be allowed to exercise those remedies that Congress has provided for him, without the impediment of a multitude of impalpable springes set by varied lower court decisions. The criminal litigant need not concern himself with the judicially fashioned doctrine of judicial immunity, or willful deprivation of right, nor should the civil litigant be required to prove a willful, and therefore criminal, deprivation or be impeded otherwise before realizing his constitutional guarantees.

In Lee v. Florida, supra, the court said at 392 U.S. 385:

> "* * *the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'."

In 1960 the court said:

> "'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'" Elkins v. United States, 364 U.S. 206, 222 (1960).

The Government, both as prosecutor and as judge, as well as others, negligently, and sometimes willfully, deprives citizens of federal rights.

As stated in Elkins, supra, and quoted in Lee v. Florida, supra, Justice Holmes stated:

> "For those who agree with me no distinction can be taken between the Government as prosecutor and the Government as judge."

The litigant prosecuted is actually vindicated by the court, and the litigant judged in a civil matter is merely guaranteed vindication by the Constitution. The answer to the comprised question is deemed to be the threshold to allow, or clearly preclude, the realization of the civil litigant's constitutional guarantees.

If this Court finds that a civil litigant negligently deprived of a federal

right has no federal remedy, then the Court should so pronounce, in order that Congress may be alerted to its failure to make necessary and proper laws to carry into execution the provisions of the Constitution. On the other hand, if the Court finds that a civil litigant negligently deprived of a federal right does have a federal remedy, then the Court should so pronounce, in order that the judiciary may be directed.

The question touches every citizen, a state civil litigant or potentially so, and each judge, court and officer of the court. The pale of both the judicial role and doctrine of official immunity will be established by an answer, and government will be alerted to govern.

For these reasons it is respectfully prayed that a writ of Certiorari issue to review the order of the Arizona Court of Appeals.

Respectfully submitted this 7th day of October, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 1975, three copies of the Petition for Writ of Certiorari were hand-delivered or mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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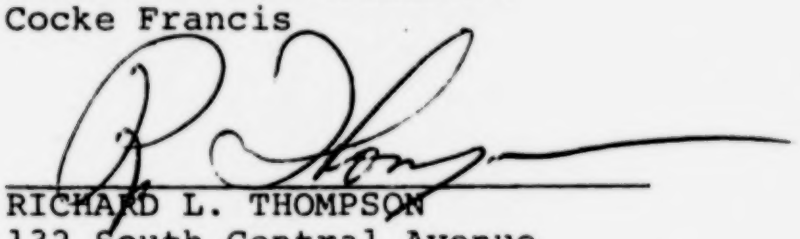

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Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

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In propria persona

Filed:
January 14, 1974

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FRANCIS M. COCKE, Plaintiff, vs. IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Defendants.	CIV 74-20 PHX WPC COMPLAINT FOR RELIEF FROM STATE COURT JUDGMENTS AND ORDERS ENTERED WITHOUT JURISDICTION, AND FOR INJUNCTION AND DAMAGES

I.

PRELIMINARY STATEMENT OF
PLAINTIFF'S CAUSE OF ACTION

On October 9, 1968, plaintiff F. M. Cocke and Joan H. Cocke (divorced) as Sellers entered into a written agreement with James Stewart Company or its nominees as Buyers, for the sale and purchase of two parcels of land under the terms set forth in written escrow instructions to Transamerica Title Insurance Company of Arizona, as Escrow Agent and Title Insurer. Inasmuch as Transamerica remains unwilling to issue its title policies and close the escrow in accordance with new demands [2] made by Buyers, as well as unwilling to return Sellers' deeds following repudiation or cancellation of the escrow agreement, there has been no transfer of title or change in possession under its terms. Title to an undivided half-interest in Parcel 1 was and is held by First National Bank of Arizona as trustee, and its additional escrow instructions were deposited into escrow on or about October 25, 1968, along with its deed, and were accepted by all parties as part of the escrow instructions agreed to as constituting the terms of deposit of Sellers' three deeds. Joan H. Cocke is life tenant of the trust. A copy of the agreement and of the trustee Bank's additional instructions are attached hereto as Exhibit A. The fine print escrow instructions on the back of Transamerica's printed escrow form have been retyped to more legible size. F. M. Cocke's deed to his undivided half-interest in Parcel 1 and his deed to his Parcel 2, copies of which are attached as Exhibit B, were deposited into escrow by the broker on or about December 31, 1968, following a survey to determine the exact metes and bounds of each of the two Parcels.

Following the deposit of the trustee Bank's deed, Joan H. Cocke, James Stewart Company with its nominees M. Seth Horne and Maurine D. Horne as Buyers, and Transamerica, attempted by joint and several activities to bring about substantive alterations in the escrow instructions, and joined in concerted attempts to mislead and to coerce F. M. Cocke into submitting to such alterations. Each of such three parties in a separate suit in Civil Case No. C-222472 in Maricopa County Superior Court sought and obtained through an attorney at law the entry of a separate judgment and decree against F. M. Cocke. Each of these judgments in intent, substance and effect does unlawfully alter or delete at least one of the controlling terms of such escrow instructions, without jurisdiction in the court. The entry of such judgment [3] has deprived F. M. Cocke of a right, privilege or immunity secured to him by the federal constitution and laws, in furtherance of the concerted attempts by such other three parties to mislead and to coerce him into submitting to such alterations.

Subsequently, the state trial court judge and two appellate court judges entered orders in aid of carrying such unlawful alterations into effect. By the entry of each such order the judge has deprived F. M. Cocke of a right, privilege or immunity secured to him by the federal constitution and laws, in furtherance of such concerted attempts to mislead and to coerce him into submitting to the alterations. By wrongfully using the coercive power of the State of Arizona in aid of carrying such unlawful alterations into effect, each of such judges in furtherance of such concerted attempts has joined in an attempt, by unlawful threat of force to be applied under color of official right, to extort from F. M. Cocke his consent to such unlawful alterations, so depriving him

of a right, privilege or immunity secured to him by the federal constitution and laws, and obstructing the due course of justice in the courts of the State of Arizona.

Under pretense and color of state law and authority, such other parties to the agreement, their attorneys at law, and the three judges by joint and several action with discriminatory intent and purpose have subjected or caused to be subjected plaintiff F. M. Cocke to the deprivation of equal rights, privileges and immunities secured by the constitution and laws of the United States to a citizen thereof, including deprivation of his right to like access to the courts of the State of Arizona for the protection of property, the prevention and redress of wrongs, and the enforcement of contracts. Plaintiff has been deprived of his civil rights to equal protection of the laws and due process of law guaranteed by the 14th Amendment to the federal [4] constitution. By such deprivations plaintiff has been damaged by way of harassment, extra expense, the direct taking of his time, and delay in making higher and better use of his land.

II.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1331, since federal questions are involved in this action, and under 28 U.S.C. §1343, since plaintiff's rights, privileges and immunities under the laws and Constitution of the United States have been denied under color of state law. Plaintiff's cause of action arises under such laws and Constitution and under the equal protection and due process clauses of the 14th Amendment. Statutory foundation

for plaintiff's suit may be found in 42 U.S.C. §1981, 1982 and 1983, since defendants' conduct denies plaintiff's federal statutory and constitutional rights, and 42 U.S.C §1985, since defendants' joint conduct amounts to conspiracy, and 42 U.S.C. §1986, since each of the defendants neglected or refused to prevent the offending conspiratorial conduct, and 42 U.S.C. §1988, with respect to proceedings in vindication of civil rights.

III.

THE PLAINTIFF

Plaintiff F. M. Cocke is and has been for more than sixty-five years a citizen of the United States and a resident of Maricopa County, and is and has been for more than twenty-five years the owner of Parcel 2, and the owner of an undivided half-interest in Parcel 1, and the farmer of both parcels.

The duties assumed by F. M. Cocke under the agreement and escrow instructions, as spelled out on page 1 and by paragraph 1 of the fine print, were to deposit good and sufficient deeds into escrow and to sign the mortgage releases when prepared and delivered into escrow by Buyers. These things he timely did. [5]

Fine print paragraph 14 places on the Escrow Agent, not on F. M. Cocke, the duty to close the escrow "when these instructions have been complied with." The quoted clause includes compliance by the Buyers and Transamerica as escrow agent and title insurer as well as by F. M. Cocke. On March 10, 1969, following Buyers' delivery into escrow of a number of new written demands, the escrow agent formally notified Sellers by mail that Buyers had done everything required

of them to close the escrow. However on November 27, 1972, Transamerica, Hubert Kelly for the Buyers, and Loretta Whitney for Joan H. Cocke, entered into a written agreement that Buyers had not yet complied with the October 9, 1968, agreement, and would deposit additional funds into escrow to cover the deficiency. The judgment in favor of Buyers, September 27, 1972, assessed more than $47,000 in damages against F. M. Cocke on Buyers' claim that he was the one who had delayed close of escrow. The trial court judge ignored F. M. Cocke's timely request for findings on what act or failure to act by him caused the delay.

F. M. Cocke's Parcel 2 as described in his deed was necessarily subjected to the Notice of Lis Pendens filed by the State of Arizona in its eminent domain action against him. Such action was filed in late 1965, and was not settled until early 1970, at which time the State gave up its attempt to take a 20-foot strip of land out of Parcel 2 without payment. The State attempted to establish that the south boundary of Parcel 2 was 27-1/2 feet north of the centerline of the Jenkins Ditch, a large drainage canal which borders the south boundary of Parcels 1 and 2 and provides drainage. In order to establish such south boundary at its true location, and so reduce the area the State was taking without payment, F. M. Cocke had the canal right of way surveyed and marked. The surveyor had previously surveyed Parcels 1 and 2, and designated the canal right of way as Parcels [6] 1A and 2A. Transamerica and the Buyers were advised of the dispute and were furnished copies of the surveys of all parcels by the surveyor in December, 1968. Some fifteen months later the State, after changing its land descriptions several times, finally amended to agree with the 1892 grant of right of way for the canal, with the

subsequent prescriptive use of the canal north of the grant, and with the survey, which placed the boundary line at the north water edge of the canal, some 20 feet farther south than originally claimed.

As more particularly hereinafter set forth, in significant time sequence, Buyers and Transamerica joined in two attempts to obtain F. M. Cocke's signature to warranty deeds which included Parcels 1A and 2A, in addition to Parcels 1 and 2, although the right of way of the Jenkins Ditch was specifically excluded from the land descriptions made a part of the October 9, 1968, agreement and instructions, and was not the subject of any additional contract. The Cockes, and therefore the trustee Bank, had never acquired title to the canal right of way, although it was within their fence lines. Transamerica also attempted, as also discussed below, to establish that F. M. Cocke was in default because the surveyor had included as part of Parcel 2 a small triangle of land, about 65 square feet, not yet taken by the State at the time of his survey and description of Parcel 2. This is the Brown Engineering Company's description, which was copied into F. M. Cocke's deed to Parcel 2. However, the purpose of the Notice of Lis Pendens was to notify all interested parties that the State was lawfully taking from F. M. Cocke's property rights, including his rights in Parcel 2, as much as was needed for public use but only as much as the public was willing to pay for. The attorney who represented the State in its eminent domain case, Maricopa County No. 183278, against F. M. Cocke, was a law partner of Transamerica's attorney in C-222472. [7]

IV.

THE DEFENDANTS

1. THE PARTIES TO THE AGREEMENT, AND THEIR LAWYERS.

(1) THE ESCROW AGENT AND TITLE INSURER.

Transamerica Title Insurance Company of Arizona, an Arizona corporation, accepted the escrow instructions as the terms of deposit of Sellers' three deeds, and so assumed the duties to comply with such instructions as escrow agent and as title insurer. However, its assumption of duties as indicated on the face of its printed escrow form was subject, among other things, to paragraphs 24 and 43 of the fine print instructions on the back.

Cancellation paragraph 24 specifies that if the escrow agent, either because it is unable or unwilling, fails to comply with the escrow instructions, or escrow agreement (unless already cancelled under paragraphs 16-18 by failure of Seller or Buyer to comply), the escrow agreement is thereby ended. The escrow agent is directed to collect the charges and return any extra money to the depositors thereof, and the deeds are to be returned to the parties who executed same. The unwillingness of Transamerica to issue any title policy provided for puts an end to the agreement in the same manner as the failure of the escrow agent to comply with the instructions. Such end of the agreement is independent of compliance by Seller and Buyer, and requires no notice to or by any party.

Paragraph 43 provides, simply and effectively, that "Close of Escrow" shall mean

the date of the policy of title insurance to be issued. In other words, the escrow cannot close unless and until Transamerica guarantees the titles in the Buyer. As briefly stated in Higgins v. Kittleson (1965), 1 Ariz. App. 244, 401 P.2d 412:

> [8] The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).

Under these conditions, the unwillingness of Transamerica to issue a title policy insuring the grantee's title could stem from any failure of the escrow agent or of a buyer to comply with the escrow instructions which constitute, as here, the terms of deposit of a seller's deed, as well as from a defect in such deed or in the title to the land described therein.

In the proceedings leading to the separate judgments in C-222472 in favor of Transamerica, and in F. M. Cocke's appeals from such judgments, Transamerica has been represented by Powell B. Gillenwater as its attorney at law.

(2) THE BUYERS

James Stewart Company is an Arizona corporation engaged in the construction business and in the development of land. M. Seth Horne is president of the company. He and his wife, Maurine D. Horne, were named as nominees by the Company acting by its president. Wallace O. Tanner signed the agreement and escrow instructions for the Buyers as vice president of the Company. He also acted in the capacity of attorney at law in C-222472 for the Company and the Hornes until replaced in such representative capacity by Hubert E. Kelly and Steven H. Schneider.

On March 5, 1969, at Transamerica's office, the escrow officer handed to F. M. Cocke for his signature a stack of documents. He signed the 25 mortgage releases, but refused to sign the document on the bottom of the stack. This was the warranty deed which included Parcels 1A and 2A, in addition to Parcels 1 [9] and 2, referred to above beginning at page 6, line 10. Upon questioning, the escrow officer stated that such deed had been prepared and deposited into escrow by the Buyers, with the verbal instruction that F. M. Cocke's signature was to be obtained thereon. Since F. M. Cocke's deeds had been in the escrow file for more than two months, he signed and delivered into escrow, on a printed form furnished by the escrow agent, a 13-day notice of intent to cancel upon the continued failure of the Buyers to comply, and then left the office. As later alleged by Buyers in their pleadings, the escrow agent by telephone then reported the failure to obtain the signature to Wallace Tanner, who prepared a second spurious deed, without Parcels 1A and 2A, for F. M. Cocke's signature. A copy of this No. 2 spurious deed was attached to Buyers' complaint of April 22, 1969, as evidence that F. M. Cocke had

refused to execute the deed required to be executed by him. As evidence that he had also refused to execute the mortgage releases, Buyers attached 25 unsigned copies, apparently of the 25 originals that F. M. Cocke had signed on March 5, 1969. The trial court judge made no findings on the falseness of such claims or such evidence, despite F. M. Cocke's protests.

Copies of F. M. Cocke's notice of intent to cancel, and of the escrow agent's notice thereof to Buyers are attached as Exhibit C. The former specified that personal checks were not acceptable as payments under a cancellation notice.

On March 7, 1969, the escrow agent received Buyers' letter of new instructions and demands, enclosing two personal checks for $32,000 each, dated March 7, 1969, and Buyers' notes and mortgages totalling about $420,200. A copy of Buyers' letter, and of the escrow agent's notice that Buyers had so complied, are attached as Exhibit D. It has not been disputed that Buyers' new instructions directed the escrow agent to:

[10] ITEM 1. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, as the annual payment due January 2, 1969.

As mentioned above at page 5, line 5, on March 10, 1969, the escrow agent notified Sellers by mail that by such instructions, documents and demands the Buyers had done everything required of them to close the escrow. In view of Buyers' demand that the $64,000 represented by the two personal checks was not to be paid unless and until the warranty deeds included deeds to Parcels 1A and 2A, the escrow agent's notice to Sellers, which amounted to notice that the additional deeds were required by the escrow instructions earlier agreed to, was its second fraudulent attempt to secure warranty deeds to Parcels 1A and 2A, the first having failed five days earlier. Had either of these attempts succeeded, the close of escrow would have been delayed pending successful conclusion of a quiet title suit by the person who signed such deed against the heirs of B. J. George, whose name does not appear in the chain of title, at least to Parcel 2, after 1903. This would have effected a saving to Buyers of about $85 per day in interest charges, and a windfall for the escrow agent in its free use of funds already on deposit, [11] under fine print paragraph 12.

On March 20, 1969, the escrow agent advised F. M. Cocke that his notice of intent to cancel was ineffective because he was himself in default because Transamerica was unwilling to issue its title policy on Parcel 2 as described in F. M. Cocke's

deed. Transamerica based its announced unwillingness on its unsupported and unsupportable claim that F. M. Cocke had been divested of his earlier title to a tiny triangle of land worth about $6.00, mentioned above at page 6, line 19, by a neighbor's 1965 corrective quit-claim deed to the State of Arizona, in connection with its acquisition of highway right of way on the other side, the south side, of the Jenkins Ditch. The State, although named grantee in the neighbor's deed, made no claim of title thereunder, as shown by the record in the eminent domain case.

One of the games being played with Buyers' March 7, 1969, written demand for the inclusion of Parcels 1A and 2A into the deeds, with the March 10 written acceptance and approval of such demand by the escrow agent, and with the March 20 statement by the escrow agent before a witness that Transamerica was unwilling to insure title to Parcel 2 as described in F. M. Cocke's deed, was to mislead and coerce him into signing a new deed. The March 19 deadline for compliance by Buyers, specified by the escrow agent's written cancellation notice to Buyers on March 6, 1969, had passed, and unless Buyers and the escrow agent could establish that F. M. Cocke was himself in default when he filed his notice of intent to cancel, the agreement had already come to an end. F. M. Cocke's signature to any sort of corrective deed would admit that the earlier deed was in fact defective, that his notice of intent to cancel was therefore ineffective, and that the agreement was not cancelled even though Buyers had not complied. (This would not affect its repudiation.)

However, this concerted attempt did not succeed, since [12] F. M. Cocke signed no

new deeds. The concerted attempt may explain why, when Buyers moved the controversy to the state courts, about a month later by filing their Complaint For Specific Performance of the agreement and escrow instructions, they named as defendants only the Sellers, and have never joined Transamerica either as escrow agent holding the deeds or as title insurer. The failure of such attempt may explain the otherwise unexplainable claims made by Buyers in their Complaint, mentioned above at page 9, line 13, that F. M. Cocke had refused to execute the required deed and mortgage releases, and Buyers' submission of the unsigned copies of the No. 2 spurious deed and the second set of releases, as exhibits. F. M. Cocke's signature on a set of corrective releases, particularly if he had signed the first set on November 5, 1968, before the survey, as alleged by Transamerica in a pleading verified by the escrow officer, would serve the same purpose as a corrective deed. The possibility of curing Buyers' cancellation of the agreement by this scheme may explain attempts made by Buyers, with the apparent aid of a judge, to persuade F. M. Cocke to settle the dispute by the seemingly harmless signing of the new deed or the new releases.

On April 2, 1969, Wallace Tanner filed for record a copy of the Agreement and escrow instructions of October 9, 1968, in the office of the Maricopa County Recorder. Subsequent tax bills add James Stewart Company as an owner.

(3) THE LIFE TENANT

Joan H. Cocke signed the agreement and escrow instructions as life tenant of the trust of which First National Bank of Arizona is managing trustee. Joan H. Cocke is and

has been for many years under constant treatment for alcoholism. She was represented in the making of the agreement and escrow instructions, and the agreement as to the trustee Bank's instructions, and in C-222472, solely by Loretta S. Whitney, as her attorney at law. [13]

On October 10, 1968, by letter prepared by attorney Whitney, F. M. Cocke and Joan H. Cocke jointly directed the trustee Bank, as authorized by the trust agreement, to deposit into escrow its deed to the half-interest in Parcel 1 held by it, along with specific escrow instructions: first, that the sale was to be consummated in accordance with the instructions already agreed to by all parties, which included the cancellation provisions, and second, that the proceeds of sale of the trust land were to be disposed of as further instructed by F. M. Cocke and Joan H. Cocke.

The trustee Bank deposited its escrow instructions as directed, but along with a deed to the whole of Parcel 1 instead of the half-interest held by it, which deed it refused to correct. It appears that because of this spurious deed attorney Whitney was subsequently able to obtain a judgment that the proceeds from the trust half-interest in Parcel 1 were to be paid to Joan H. Cocke, alone, free of trust. Being aware that F. M. Cocke was to be paid for his half-interest (none of his land has ever been in a trust), trial court judge Jack D. H. Hays on December 31, 1968, plausibly ruled that Joan H. Cocke was entitled to be paid for the other half, since according to the spurious deed both half-interests were held in trust.

However, unless it be established that the various state courts had jurisdiction in C-222472 to delete the cancellation

provisions from the escrow agreement, and to delete from the record Buyers' letter of new demands received by the escrow agent on March 7, 1969, along with the escrow agent's letter of March 10, 1969, notifying Sellers that by such new demands Buyers had complied with the escrow agreement, it also appears that the question of the disposition of the trust land proceeds is moot. There are to be no such proceeds because the agreement came to an end in March, 1969, by repudiation or cancellation in accordance [14] with paragraphs 18 or 24, and the trustee Bank's deed must therefore be returned to it, as specified by the cancellation provisions. Without more, this is established by the written agreement of November 27, 1972, mentioned above at page 5, line 9, between Hubert Kelly for Buyers, Loretta Whitney for Joan H. Cocke, and Transamerica, that Buyers had not yet complied with the October 9, 1968, agreement. Further, by letter to Transamerica dated August 29, 1973, Buyers demanded that Transamerica comply with the judgment of September 27, 1972, against F. M. Cocke, alone, obtained by Buyers in their suit for specific performance of the escrow agreement, in which Transamerica was never joined. In the letter Buyers reminded Transamerica that in a meeting in its office in early January, 1973, Buyers and Transamerica agreed between themselves that Buyers had not yet complied with the agreement and escrow instructions of October, 1968. Copies of the November 27, 1972, agreement, and of Buyers' letter of August 29, 1973, are attached as Exhibit E. As established by their letter of August 29, 1973, Buyers deposited additional funds in order to attempt to comply in January, 1973: with the October, 1968, escrow instructions; with F. M. Cocke's March 5, 1969, written 13-day notice of intent to cancel upon Buyers' continued failure to comply; with

the escrow agent's March 6, 1969, written notice to Buyers that they must comply by March 19, 1969; with the escrow agent's March 10, 1969, written notice to Sellers that Buyers had complied; and with Buyers' own letter of March 26, 1969, to Transamerica affirming that all requirements on the part of the Buyers had been fully performed.

(4) THE BROKER

Arleigh H. Burton signed the escrow instructions as the real estate Broker. He has taken no position in the controversy in the state courts except to testify by depsition. Fine print [15] paragraph 23, which provides benefits for a broker, was superseded by the sixth paragraph ofSchedule "A", a part of the escrow instructions. Arleigh R. Burton is named as a nominal defendant herein to afford him proper notice in the event he should choose to join in this suit.

2. THE JUDGES

(1) IRWIN S. CANTOR, acting as the judge of the Superior Court of Arizona, in and for the County of Maricopa, in Civil Case No. C-222472, has entered judgments and orders without jurisdiction in the court.

The litigation in the state courts began in April, 1969, when Buyers filed their Complaint For Specific Performance of the agreement and escrow instructions against only Sellers. F. M. Cocke along with his answer counterclaimed against Buyers, against Transamerica as an additional defendant on his counterclaim, and crossclaimed against Joan H. Cocke, all as joint as well as several defendants indispensable to an adjudication of the rights and

obligations arising under the single contract entered into. However, the judge on Transamerica's motion ordered F. M. Cocke's claims separated by amendment into three separate claims, against each instead of all of the other parties to the agreement, over F. M. Cocke's objections. The judge thereafter dealt with the separated claims as separate and independent controversies arising from separate and independent causes of action, and eventually entered separate and independent judgments against F. M. Cocke. Each of these three judgments, in order to grant the relief sought by one of such three other parties, decisively altered the escrow instructions. Copies of the three judgments are attached hereto as Exhibit F. F. M. Cocke did not amend as to Joan H. Cocke, her claim to the trust land proceeds appearing by that time to be moot. Buyers had already answered the original counterclaim, and were basing [16] their defense on the unsupportable claims that F. M. Cocke had refused to execute the deed and mortgage releases required to be executed by him, the same as in their complaint.

(2) EINO M. JACOBSON, acting as a judge of Department B, Division 1 of the Arizona Court of Appeals, has entered orders without jurisdiction in the court, in an appeal in C-222472.

F. M. Cocke appealed from the early separate summary judgment of November 10, 1970, in favor of Transamerica on its counterclaim for attorney fees by the enforcement of only fine print paragraphs 8, 9 and 10. Subsequent to the filing of the briefs, F. M. Cocke sought by special action the dismissal of Transamerica's suit against him, on the ground that the trial court, and therefore the appellate courts, were without jurisdiction in the absence of the

Buyers. F. M. Cocke also sought stay of the proceedings on his claims against Transamerica until his claims against Buyers, as indispensable parties, could be brought before that court.

However, Department B threatened sanctions for bringing a frivolous special action, and after a recess denied all relief. Wallace Tanner, attorney for Buyers, and several members of the staff of James Stewart Company were present at the hearing, although Buyers still maintain that there was no connection between them and Transamerica in C-222472. During the recess immediately following the threat, Wallace Tanner urged immediate settlement. With Eino Jacobson writing, the judgment awarding the attorney fees was affirmed. The issues of whether the agreement had been repudiated or cancelled, so putting an end to Transamerica's and Buyers' rights thereunder, before the attorney fees were incurred, were avoided by substitution of seven questions apparently framed by the writer for the questions actually presented for review by F. M. Cocke's opening brief. The documentary evidence, presented to the Court of Appeals by reference [17] in the brief to specific pages of the abstract of the record, was ignored, as in the trial court. The Court of Appeals' decision is reported as Cocke v. Transamerica (March, 1972) 16 Ariz. App. 556, 494 P.2d 756. In Balitimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797 (1936), the court said at L.ed 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right

to introduce evidence and have judicial findings based upon it.

(3) FRANCIS J. DONOFRIO, acting as a judge of Department A, Division 1 of the Arizona Court of Appeals, has entered orders without jurisdiction in the court, in an appeal in C-222472.

Following entry in the trial court on September 27, 1972, of the separate judgment in favor of Buyers, F. M. Cocke timely filed a motion to vacate, for want of jurisdiction over the subject matter, that judgment and the Transamerica judgment as increased to $8,364.24 by the trial court judge after remand. The motion to vacate was denied November 6, 1972. The issues of whether the agreement had been repudiated, or cancelled by the failure of Buyers or the escrow agent to comply or the unwillingness of Transamerica to issue its title policy, had still not been ruled on by any court. The documentary evidence, including the agreement and escrow instructions, and Buyers' letter of new demands in violent conflict therewith, was still ignored. On January 4, 1973, F. M. Cocke filed notice of appeal from the two judgments and from the order of November 6, 1972, denying the motion to vacate same. Rule 73(b) as amended, 16 ARS Rules of Civil Procedure, allows sixty days to file notice of appeal, which time commences to run from denial of a motion to vacate, unless such motion does not qualify as a Rule 59(l) motion to alter or amend.

Arizona adopted as its Rule 59(l) the present Federal [18] Rule of Civil Procedure 59(e). Moore's Federal Practice at Volume 6A, page 59-250 (earlier edition p. 3880), says:

> Although the motion under (e) is to "alter or amend" the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or vacate. . . .The cases have wisely recognized the power of the court to vacate and set aside a judgment under 59(e).

Volume 3, Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, in §1308, page 387, discusses Federal Rule 59(e). Note 84.1 includes:

> A motion to set aside a judgment is one to alter a judgment under Rule 59(e). . . .Steward v. Atlantic Refining Co., C.A.3d, 1956, 235 F.2d 570.

The 1971 Pocket Part to Volume 3, for use during 1972, states under §1308 at page 279:

> The First Circuit has held that resort should be made to the procedure of Rule 59(e), rather than Rule 60(b), if the time for moving under the former rule has not expired. Thus where a motion to vacate a judgment is made within 10 days of entry of judgment, and does not specify the rule under which it is made, it will be construed as a Rule 59(e) motion and will suspend the finality of the judgment for purposes of appeal.

The First Circuit case was Foman v. Davis, C.A.1st, 1961, 292 F.2d 85, reversed on other grounds, 1962, 83 S. Ct. 227, 371 U.S. 178, 9 L.ed 2d 222.

At page 280 of the Pocket Part, note 84.1 includes:

> Appellants' timely motion to vacate judgment of dismissal was equivalent of a motion to alter or amend judgment and terminated running of time for filing notice of appeal from date of judgment of dismissal to date of denial of motion to vacate; . . .Theodoropoulos v. Thompson-Starrett Co., C.A. 2d 1969, 418 F.2d 350, certiorari denied 90 S. Ct. 1697, 398 U.S. 905, 26 L.ed 2d 65.

Subsequent to the filing of F. M. Cocke's opening brief, Francis J. Donofrio, adhering to the trial court judge's separation of F. M. Cocke's counterclaims against Transamerica from those against the Buyers, entered an order dismissing the appeal in its entirety as to the Buyers. The only ground stated was [19] that the notice of appeal was untimely. F. M. Cocke's motion for findings of the particular grounds upon which the stated untimeliness was based was denied by order entered by Francis J. Donofrio. Later, he entered the order dismissing the appeal as to Transamerica, on its motion, on the stated ground that the appeal was frivolous, so once again avoiding the issues of whether the agreement had been repudiated or cancelled, and ignoring the documentary evidence.

In Preston v. Denkins (1963) 94 Ariz. 214, 382 P.2d 686, the Arizona Supreme Court, sitting en banc, in a unanimous decision held that a judgment void for lack of jurisdiction may be set aside by means of a motion to vacate, and that an order setting aside an entire judgment as void does not leave the judgment valid as against defendants

not properly before the court on the motion to vacate.

3. THE CORPORATE OFFICER OF THE COURT

Title Insurance Company of Minnesota, a Minnesota corporation, did willingly accept its appointment as an officer of the court under the trial court judge's Order and Writ of Assistance, etc., of October 31, 1973, on Buyers' Application in C-222472. Minnesota Title agreed to close the escrow in accordance with the escrow instructions as altered by the previous judgments and orders, as further altered by such Order and Writ, and as to be still further altered by the trial court judge in accordance with such Order and Writ. Minnesota Title has willingly accepted delivery to it by Transamerica of the escrow file, including the deeds, in the following circumstances: The Order of October 31, 1973, took judicial notice of, and so established, the fact that Transamerica was unwilling as escrow agent to comply with the escrow instructions and also unwilling to issue any title policy, so requiring under paragraph 24 the return of Sellers' deeds to the party who executed same. It was established [20] on November 27, 1972, and again in early January, 1973, since the Buyers did not even attempt to comply until the latter date, that the escrow agent was unable or unwilling to comply with the escrow instructions on March 10, 1969, when it formally notified Sellers that Buyers had complied, as pointed out beginning at page 14, line 3, above. In the face of the established failure of the Buyers to comply, the established inability or unwillingness of the escrow agent to comply, and the established unwillingness of Transamerica to issue its title policy, the trial court judge, the Buyers, Transamerica, and Minnesota Title, instead of

returning the deeds to the parties who executed them, joined in the delivery of such deeds to Minnesota Title, in furtherance of the concerted attempt to extort from F. M. Cocke his consent to the unlawful alterations to the agreement and escrow instructions.

Copies of Buyers' Application For Writ Of Assistance, etc., of the trial court judge's Order of October 31, 1973, granting the Writ, and of the Writ itself, are attached as Exhibit G.

V.

ADDITIONAL ALTERATIONS
SOUGHT BY THE OTHER THREE PARTIES

Subsequent to the deposit of his deeds into escrow by the broker on or about December 31, 1968, F. M. Cocke advised Mr. Tanner, who signed the agreement for James Stewart Company, that he was in need of funds, and could wait no longer for the Buyers to complete their metes and bounds descriptions of the 5-acre mortgage release parcels. Mr. Tanner suggested, and F. M. Cocke agreed, that $20,000 would be advanced to F. M. Cocke from escrow funds upon his furnishing a note and mortgage on Parcel 2 for $40,000, as double security therefor, and allowing more time for Buyers to complete their release descriptions. On or about January 10, 1969, F. M. Cocke executed and deposited [21] on the escrow officer's desk the $40,000 note and mortgage, and received in exchange the escrow agent's check for $20,000 drawn on escrow funds. However, Mr. Tanner picked up the note and mortgage from the desk and carried them from the escrow office, over F. M. Cocke's objections but with the tacit approval of the escrow officer, in violation of fine print

paragraphs 11 and 12 of the escrow agreement. By his objections F. M. Cocke made it clear that it was his intention to deliver the note and mortgage into escrow. As defined in ARS §44-2208(14) delivery means voluntary transfer of possession. Even if Transamerica could establish, as claimed by it, that by James Stewart Company's removal of the note and mortgage it merely took back its $20,000 earnest money payment delivered to Sellers by the escrow agent, it is clear that the escrow could not close until either the note with mortgage, or the extra $20,000 represented by same, was delivered into escrow.

2. On January 21, 1969, F. M. Cocke signed and delivered into escrow the Instructions And Agreement On Distribution Of Funds prepared by the broker, a professor of accounting, in accordance with the trustee Bank's instructions specifying joint control of the trust land proceeds by F. M. Cocke and Joan H. Cocke. By letter of February 26, 1969, to the escrow agent, prepared by her attorney, Joan H. Cocke repudiated the trustee Bank's adoption of the cancellation provisions and its instructions as to the joint control, and demanded payment of such proceeds direct to her. Buyers by their documents and new demands delivered into escrow my mail on March 7, 1969, the escrow agent by its March 10, 1969, letter notifying Sellers that by such documents and demands Buyers had complied, and the trial court judge in the judgment entered September 27, 1972, in favor of Buyers, joined in such repudiation.

3. March 19, 1969, was the last day for Buyers to [22] comply under the mandatory cancellation notice received from the escrow agent, following F. M. Cocke's March 5, 1969, notice of intent to cancel.

4. As discussed above at page 11, line 2, to page 12, line 20, on March 20, 1969, the escrow agent announced Transamerica's unwillingness to issue its title policy on F. M. Cocke's Parcel 2. Under paragraph 24 such unwillingness put an end to the agreement, if not already cancelled by the escrow agent's March 10, 1969, notice that Buyers had complied or by the failure of Buyers to comply by March 19, 1969.

5. As mentioned above at page 14, line 26, on March 26, 1969, in a second letter to the escrow agent, Buyers affirmed their position that the documents and demands delivered into escrow on March 7 met all requirements on the part of the Buyers. Buyers' continued insistence that their new demands be met as a condition to close of escrow constituted, without more, repudiation of the agreement. In Equitable Trust Co. of New York v. Denver and R. G. Railroad Co. v. Western Pac. Railroad Co. (1917) 244 F. 485, affirmed CCA, 2d (1918) 250 F. 327, cert. den. (1918) 246 U.S. 672, 62 L.ed 932, 38 S. Ct. 423, Learned Hand, District Judge, said at 244 F. 501:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. That is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

VI.

THE ENLISTMENT OF STATE POWER

1. On April 22, 1969, Buyers filed their Complaint For Specific Performance of the agreement and escrow instructions, and for damages for delay, against only Sellers. A copy of the agreement and instructions was attached to the complaint. The [23] case was assigned to trial court judge Irvin Cantor as Case No. C-222472. Although Buyers demanded as part of the relief sought that the title insurance policies be issued, that the escrow be ordered closed, and that Transamerica be ordered to release the mortgages on the 25 release parcels as provided in the agreement, Buyers have never joined Transamerica, as mentioned above at page 12, line 1. The suit was prosecuted against only F. M. Cocke.

2. On June 23, 1969, F. M. Cocke filed his answer and compulsory counterclaim and cross-claim jointly and severally against Buyers, Transamerica, and Joan H. Cocke, as indispensable parties to the adjudication of the mutual rights and obligations arising from the single contract. F. M. Cocke's counterclaim sought return of Sellers deeds, and damages for delay, based on his claims:

(1) that the rights and obligations of Sellers and Buyers were subjected to the rights and obligations delegated by them to Transamerica as esscrow agent and title insurer, particularly by fine print Cancellation paragraph 24;

(2) that without more the agreement had been repudiated, and so terminated or cancelled, by Buyers' new demands received by the escrow agent March 7, 1969,

so requiring return of the deeds;

(3) that the agreement had been cancelled as specified by paragraph 24 by the escrow agent's formal written notice of March 10, 1969, to Sellers that by the documents and new demands received from Buyers they had done everything required of them to close the escrow, so establishing the escrow agent's inability or unwillingness to comply with the instructions earlier agreed to, and requiring the return of the deeds;

(4) that the agreement had become cancelled as specified by paragraph 18 by Buyers' failure to comply within the [24] 13-day period following the filing on March 5, 1969, of F. M. Cocke's notice of intention to cancel, as provided for by paragraphs 16 and 17, so requiring return of the deeds; and

(5) that the agreement had been cancelled as specified by paragraph 24 by Transamerica's unwillingness to issue its title policy on Parcel 2, as announced on March 20, 1969, by the escrow officer, so requiring return of the deeds.

3. By minute entry of September 2, 1969, the trial court judge ordered that F. M. Cocke's counterclaim and cross-claim be amended so as to separate the joint claims into three separate claims, one against each of the three defendants as discussed above at page 15, line 19, with separate and independent judgments. F. M. Cocke did not amend his cross-claim against Joan H. Cocke, for the reasons stated above at page 15, line 30.

4. On October 3, 1969, Transamerica counterclaimed against F. M. Cocke, seeking

attorney fees by the enforcement of fine print paragraphs 8, 9 and 10 without regard to the issues raised by F. M. Cocke as to whether the agreement had been repudiated or cancelled before the attorney fees were incurred.

5. On November 10, 1970, the trial court judge entered separate summary judgment in favor of Transamerica and against F. M. Cocke on their opposing counterclaims, and awarded costs and attorney fees to Transamerica in the amount of $5,192.24. Neither in nor in connection with the judgment where there any findings upon the issues raised by F. M. Cocke or upon the undisputed documentary evidence presented in support of his claims, contrary to Rule 56(d).

6. On November 19, 1970, the trial court judge entered judgment in favor of Joan H. Cocke on F. M. Cocke's cross-claim against her, without regard to the cancellation provisions, which were adopted by the trustee Bank. The deposit of the trustee Bank's deed into escrow in the written terms which accompanied [25] such deposit, and the acceptance thereof by the escrow agent, constituted a contract in and of itself between the trustee Bank and the escrow agent. Such contract could not be altered by a court without the consent of both, and the terms of deposit required under paragraphs 18 and 24 the return of such deed upon the established failure of the escrow agent and of Buyers to comply in March, 1969.

7. By minute order of December 8, 1970, the trial court judge granted Buyers' motion for summary judgment against only F. M. Cocke, on their opposing claims. Trial on the issue of the dollar amount of the

damages for delay claimed by Buyers to have been caused by F. M. Cocke was subsequently set.

8. Prior to the trial without a jury F. M. Cocke under Rule 52(a) requested findings of fact and conclusions of law as to when and by what act or failure to act he had failed to comply with the agreement and instructions so as to cause the claimed delay. He also requested findings and conclusions as to when and by what act Buyers had complied so that the escrow could have been properly closed instead of cancelled. These requests were completely ignored. The beginning of the period of claimed delay was thus never established.

9. On September 27, 1972, following the trial, the trial court judge entered judgment in favor of Buyers, granting them specific performance by F. M. Cocke, alone, of the agreement and instructions as altered by the judgment, and awarding them damages against him for claimed delay in the amount of $47,004.86. As with the judgment in favor of Transamerica, there were no findings upon the issues raised by F. M. Cocke or upon the undisputed documentary evidence presented in support of his claims.

10. Following the piecemeal dismissal of F. M. Cocke's appeal from the judgments and from denial of his motion to vacate same, as set forth above beginning at page 18, line 28, the Court [26] of Appeals by order dated October 30, 1973 directed the return of the record to Superior Court.

11. As mentioned above at page 19, line 17, on Buyers' Application in C-222472 the trial court judge on October 31, 1973, issued the Order and Writ of Assistance to carry the unlawful alterations into effect

by ordering that the escrow be closed in accordance therewith. Among other things, the Order, prepared by Buyers' attorney, authorized Minnesota Title to execute all documents, including warranty deeds, in the name of Francis M. Cocke. This would include the No. 2 spurious deed and the second set of mortgage releases, mentioned above at page 12, line 7. Among other things the Writ, also prepared by Buyers' attorney, directed the Sheriff of Maricopa County to remove F. M. Cocke from possession of the land upon compliance by Buyer with the terms as altered by the Order and Writ and as to be further altered by further court order.

VII.

WANT OF JURISDICTION OVER THE SUBJECT MATTER

Each of the separate judgments in C-222472 in favor of the three other parties to the agreement, Joan H. Cocke, Transamerica, and the Buyers, was and is void on its face for lack of jurisdiction over the subject matter, as was and is also each of the orders of the appellate courts which directly or indirectly upheld such judgments.

In Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945, 32 L.Ed.2d 332, the court said at 156:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> Jurisdiction is defined to be the power to hear and determine the

> subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to enforce such judgment or decree. (Citations omitted.) [27]
>
> Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution. (Emphasis added.) Riggs v. Johnson County, 1867, 73 (6 Wall.) U.S. 166, 187, 18 L.Ed 768.

In the words of Rule 12(b), if a court is without the power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter. Rule 12(b) 6 & 1, as amended, Federal Rules of Civil Procedure, and 16 ARS Rules of Civil Procedure.

1. ALTERATION OF CONTRACTS

As briefly stated in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, another universal rule is:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed

> in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.
>
> (Citations omitted)

It follows that where the relief sought is the alteration of a valid provision of a valid contract, the court is without jurisdiction over the subject matter.

2. INDISPENSABLE PARTIES

In Provident Tradesmen's Bank & Trust Co. v. Patterson (Jan., 1968) 390 U.S. 102, 19 L.Ed 2d 936, 88 S. Ct. 733, in reviewing Rule 19 as amended and the cases relied on by the Court of Appeals in dismissing a complaint in the absence of an indispensable party, the court at page 951 of 19 L.ed 2d quoted and approved Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599. In Mallow v. Hinde, the court upheld dismissal of the complaint, even though the absent party could not be joined because not within the territorial jurisdiction of the lower court. The court in that early case said: [28]

> In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . .We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . .We put it on the ground that

> no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.

Put another way, in order to grant by judgment or decree the relief sought the court must have power or jurisdiction over all persons whose rights are to be affected thereby; otherwise, execution could not issue to carry the judgment or decree into effect. Terrell v. Allison, 21 Wall. 289, 22 L.ed 634, was one of the cases stating the rule pointed to in Hamilton v. Nakai, supra, that the jurisdiction of a court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties. In Terrell the court also stated and followed the rule that a writ of assistance can only issue against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree.

In the words of Rule 12(b)1, 6 & 7, the court is left without jurisdiction over the subject matter where left without the power or jurisdiction to grant the relief sought because of failure to join a party indispensable under Rule 19.

3. WANT OF FINDINGS

In none of the proceedings, orders, or judgments in the state trial court in C-222472 was there any specification, decision, finding of fact or conclusion of law, under Rule 56(d) on summary judgments or under Rule 52(a) on trials to the court, on the issues of fact and law raised by

F. M. Cocke in his affirmative claims against Joan H. Cocke, Buyers and Transamerica, [29] or on the undisputed documentary evidence presented in support of such claims.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603, 19 S. Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512: "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . .The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

In United States v. Aluminum Co. of America, 2 F.R.D. 224 (1941), the District Court S.D. New York said at page 231:

> Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608, 609, 19 S. Ct. 761, 43 L.ed 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 49 S. Ct. 144, 73 L.ed 243. See In re G. W. Giannini,

Inc., 2 Cir., 90 F.2d 445, 447, 111 A.L.R. 1492.

So far I have refrained entirely from going into numerous issues made by the pleadings and have not even mentioned the evidence bearing on them.

For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that, in order to obey the rule, as construed by the Supreme Court--regardless of the contents of the oral opinion--findings must be made and conclusions stated on all issues in the present case.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S. Ct. 797 (1936), supra, the court said at L.ed. 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

It follows that the separate judgments entered in C-222472 in [30] favor of Joan H. Cocke, Transamerica, and the Buyers were wanting in findings and therefore wanting in due process of law, and the court was therefore without authority or jurisdiction to grant the relief sought and purportedly

granted, and thus without jurisdiction over the subject matter.

In Thompson v. Whitman, 85 U S. 457, 21 L.ed 897, the court said at L.ed 901:

> Thus, in Elliott v. Peirsol, 1 Pet., 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, it it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.

In Arenas v. United States, 95 F. Supp. 962, affirmed (9th Cir. 1952) 197 F.2d 418, the district court said, at page 970 of F. Supp.:

> In brief, the Court, in the prior Arenas case, had no jurisdiction of the subject matter which it assumed to determine, the relationship of Arenas and others not before the Court to Guadaloupe's allotment as her heirs at law. Such lack of jurisdiction appears

> on the face of the judgment roll. The judgment to that extent is, therefore, void on its face, . . .
>
> (emphasis added)

In Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F.2d 514, the court said at 516:

> . . .if jurisdiction is lacking the trial court should on its own motion decline to proceed and if the case is tried where jurisdiction is lacking, the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action. These principles are fundamental and were recognized and applied by us in the recent case of Rock Island Millwork Co. v. Hedges-Gough Lumber Co. (8th Cir., 1964), 337 F.2d 24, 26, 27.
>
> (emphasis added) [31]

For related rulings see Riley v. County of Cochise (Div. 2), 10 Ariz. App. 55, 455 P.2d 1005 (1969), and Quiroz v. Alfaro (Div. 2), 18 Ariz. App. 173, 500 P.2d 1161 (1972), Reh. den. Oct., 1972.

VIII.

WANT OF JURISDICTION IN C-222472

1. ALTERATION OF CONTRACTS

Each of the three separate judgments in C-222472 against F. M. Cocke was and is void on the face of the judgment roll for want of power or jurisdiction to grant the

relief sought and purportedly granted, which relief was alteration of the escrow instructions:

(1) by the judgment in favor of Joan H. Cocke, the deletion of the trustee Bank's instructions, which included the cancellation provisions;

(2) by the judgment in favor of Transamerica, the deletion of at least the cancellation provisions, by the enforcement of only paragraphs 8, 9 and 10;

(3) by the judgment in favor of Buyers, the deletion of the conditions specified in the first sentence of fine print paragraph 14 as to compliance by Buyers and as to the willingness of Transamerica to issue its title insurance policy, and the deletion of the cancellation provisions.

2. INDISPENSABLE PARTIES

Each of such judgments was and is void on the face of the judgment roll for want of power or jurisdiction to grant the relief sought and purportedly granted, because of failure to join a party indispensable under Rule 19:

(1) by the judgment in favor of Joan H. Cocke, by the failure to join the trustee Bank and the escrow agent in the alteration of the terms of deposit of the trustee Bank's deed, agreed to by them. [32]

(2) by the judgment in favor of Transamerica, by the failure to join the Buyers, indispensable in the determination of whether the agreement was ended, so ending the rights thereunder of Transamerica and of Buyers, before the attorney fees were incurred;

(3) by the judgment in favor of Buyers, by the failure to join Transamerica as title insurer and holder of the deeds.

3. WANT OF FINDINGS

Each of such judgments was and is void on the face of the judgment roll for want of power or jurisdiction to grant the relief sought and purportedly granted, because such judgment was wanting in findings upon decisive issues presented and upon undisputed documentary evidence presented which was decisive of such issues, and therefore wanting in due process of law. In none of such judgments, nor in the trial court judge's orders based thereon, was there any finding as to the effect of the following:

(1) the cancellation provisions;

(2) the trustee Bank's written escrow instructions adopting the cancellation provisions;

(3) F. M. Cocke's March 5, 1969, written notice of intent to cancel, and the escrow agent's written notice thereof to Buyers, notifying Buyers that they must comply by March 19, 1969;

(4) Buyers' documents and written demands received by the escrow agent on March 7, 1969;

(5) the escrow agent's letter of March 10, 1969, formally notifying Sellers that by deposit of such documents and demands Buyers had complied;

(6) the written agreement of November 27, 1972, between Transamerica and counsel for Joan H. Cocke and for Buyers, that Buyers had not yet complied; [33]

(7) the further agreement in January, 1973, between Transamerica and the Buyers, evidenced by Buyers' letter of August 29, 1973, attached as Exhibit "K" to Buyers' September 7, 1973, Application to the trial court for the Writ of Assistance, that by January, 1973, Buyers had not yet complied.

IX.

SETTLED PRINCIPLES

It is well settled that expressions by a party to an escrow agreement, particularly where there has been no change in title or possession under its terms, as here, of mere willingness and ability to comply are immaterial to the question of actual compliance. 28 Am Jur 2d, Escrow, §21, 22, 24; 30A CJS, Escrows, §10(a) and 10(b).

As pointed out in Tucson Title Insurance Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963):

> An escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation.

It has long been settled that where the conditions are fulfilled and the escrow agent fails or refuses to deliver or return the documents or money deposited into escrow, the remedy either in law or equity lies against the escrow agent to obtain the deposit, not against the other party to obtain damages or to compel specific performance of the escrow contract. The other party may be joined in the action against the escrow agent. 28 Am Jur 2d, Escrow, §8, 17, 39; 30A CJS, Escrows, §15.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. 236, the court said, quoting Scott v. McNeal, 154 U.S. 34, 46, 38 L.ed 896, 901, 14 S. Ct. 1108:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, ... [34]

The Arizona case Truax v. Corrigan, 257 U.S. 312, 66 L.ed 254, 42 S. Ct. 124, quoted and followed Barbier v. Connelly, 113 U.S. 27, 28 L.ed 923, 5 S. Ct. 357, in which the court said at L.ed 264:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all persons. . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; . . .

In Shelly v. Kraemer, 334 U.S. 1, 92 L.ed 1161, 68 S. Ct. 836, the court held that the action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the meaning of the equal protection clause, and that where the coercive power of state govenment is used by its courts to deny rights subject to the protection of the 14th Amendment, the action of the state courts cannot stand.

In Wells Fargo & Company v. Oscar G. Taylor, 254 U.S. 175, 65 L.ed 205, 41 S. Ct. 93, the court said, in discussing the provision in the Judicial Code that a federal court shall not grant an injunction staying proceedings in a state court, except in bankruptcy cases, at L.ed 211:

> . . .it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts. . . . from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.

In Northern Pacific Ry. Co. v. Kurtzman, County Treasurer, 82 F. 241, the court said:

> I recognize the absolute correctness of the proposition that the Federal courts are forbidden by express provisions in the law enacted by congress [35] to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the Federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifing such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers,

> the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. Galpin v. Page, 18 Wall. 351-375; Pennoyer v. Neff. 95 U.S. 714-748; Arrowsmith v. Gleason, 129 U.S. 86-101, 9 Sup. Ct. 237; Marshall v. Holmes, 141 U.S. 589-601, 12 Sup. Ct. 62. The bill of complaint attacks the judgment of the superior court on the ground that it acted without jurisdiction in rendering the judgments.

In Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705, 92 S. Ct. 2151 (1972), the court held that:

> Provision of Civil Rights Act authorizing a suit in equity to redress deprivation under color of state law of any rights, privileges, or immunities secured by Constitution is within "expressly authorized" exception of federal anti-injunction statute prohibiting a federal court from enjoining a state court proceeding except as expressly authorized by act of Congress. 28 U.S.C.A. §2283; 42 U.S.C.A. §1983.

At page 2161 of S. Ct. the court said:

> It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25

> L.Ed 676 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

And at page 2162:

> §1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25 L.ed. 676. In carrying out that [36] purpose, Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress.

In Lucarell v. McNair (6th Cir., Jan. 1972), 453 F.2d 836, the court said:

> Turning to the question of McNair's asserted immunity, it is true that as Referee and Administrative Officer of the Juvenile Court of Trumbull County, McNair was

> entitled to the full reach of the doctrine of judicial or, in this case, quasi-judicial immunity, and that the doctrine is applicable to actions instituted pursuant to §1983. Nevertheless, the doctrine is not without bounds. Some time ago the Sixth Circuit stated its views as to the limits of the protection thus afforded. In Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932), we indicated the view that a judge loses all immunity when he acts in absence of all jurisdiction. This rule was discussed at some length in the more recent case of Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). See also Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1871).

In Hoffman v. Halden (9th Cir. 1959), 268 F.2d 280, the court said at 296:

> In a Civil Rights conspiracy case, the injury and damage must flow from the overt acts. . . .In the usual case, the order of the court would be the proximate cause and the various preliminary steps would be remote causes of any injury. . . .

and at page 298:

> The law is clear that when two or more persons conspire to violate the civil rights of an individual, acting under color of state law, if one or more of the conspirators is a state officer, then the mere fact that certain of the other conspirators are not state officers

> constitutes no defense to any of them under the Civil Rights statutes.

Hoffman at page 299 in discussing the immunity of judges cites Bradley v. Fisher, and goes on to say:

> A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts. [37]

In Bradley v. Fisher, 13 Wall. (U.S.) 335, 20 L.ed 646, the court said, at pages 351, 352 of 13 Wallace:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Cohen v. Norris (9th Cir. 1962) 300 F.2d 24, the court said at page 29:

> In our view Monroe v. Pape announces the rule that an allegation of a purpose to discriminate

or a purpose to deprive one of any federal right, is not essential to the statement of a claim under §1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment. It is accordingly necessary for us to overrule in this respect the contrary holdings in our earlier decisions in Agnew v. City of Compton and Hoffman v. Halden, and to disapprove the contrary statement made by way of dictum in Walker v. Bank of America.

§44-1211 (14 ARS, 1967) provides:

A person is guilty of a misdemeanor who:

1. Is a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels or any right or interest issuing therefrom, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.

2. Is a party to any bond, action or judgment, or execution, contract or conveyance had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.

3. Is a party as provided in paragraph 1 or paragraph 2 of this section, and

(a) At any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends such transaction as true, and had or made in good faith, or

(b) Upon good consideration aliens, assigns or sells any of such lands or goods or other things which have been so conveyed to him. [38]

PRAYER FOR RELIEF

Plaintiff respectfully prays this Court to enter an order:

1. Granting a temporary restraining order or preliminary injunction on application of plaintiff if necessary to preserve the status quo as to title or possession;

2. Setting aside each of the three separate judgments, in favor of Joan H. Cocke, in favor of Transamerica, and in favor of Buyers James Stewart Company and M. Seth Horne and Maurine D. Horne, for want of jurisdiction in the court;

3. Granting plaintiff a declaratory judgment pursuant to the provisions of 28 U.S.C. 2201 declaring his rights and defendants' corresponding duties and liabilities arising under the transaction set forth in the complaint herein;

4. Ordering the return of Sellers' three deeds to the parties who executed same;

5. Ordering the return of the $40,000 note and mortgage to plaintiff on such terms as be deemed just and equitable;

6. By way of quieting title, establishingt plaintiff's estate in Parcel 2 as described in his deed thereto, and the estate of plaintiff and his co-tenant First National Bank of Arizona, as trustee, in their undivided half-interests in Parcel 1, as described in plaintiff's deed to his half-interest in same, and barring and forever estopping defendants James Stewart Company, M. Seth Horne and Maurine D. Horne from having or claiming any right or title to the premises, claimed by them as set forth in this [39] Complaint, adverse to plaintiff or the trustee Bank, all as provided by ARS §12-1101, 12-1102 as amended, 12-1103 as amended, and 12-1104;

7. Granting plaintiff damages severally and jointly from defendants Cantor, Jacobson, Donofrio, Tanner, Kelly, Schneider, Whitney, Gillenwater, Transamerica, Minnesota Title, James Stewart Company and M. Seth Horne and Maurine D. Horne, and Joan H. Cocke, pursuant to 28 U.S.C. §1343, 42 U.S.C. §1981, 1982, 1983, 1985, 1986 and 1988 and calculated as follows:

   a. $50,000 lost by plaintiff by delay in making higher and better use of his land, by reason of defendants' misconduct in C-222472;

b. $50,000 in damages for infringement of his civil rights by defendants' misconduct in C-222472;

c. $50,000 in punitive, exemplary damages by reason of defendants' misconduct in C-222472.

d. Such other and further relief as the Court deems just and equitable.

/s/ FRANCIS M. COCKE
1320 South Priest Road
Tempe, Arizona 85281

STATE OF ARIZONA)
: ss.
County of Maricopa)

F. M. COCKE being first duly sworn, on oath deposes and says:

That as plaintiff he has written the foregoing complaint and knows the contents thereof, and that the matters and things [40] stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ FRANCIS M. COCKE

[41] FRANCIS M. COCKE, Plaintiff
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

In propria persona

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FRANCIS M. COCKE,	)
Plaintiff,	)
vs.	)
IRWIN S. CANTOR, et al.,	)
Defendants.	)

COMPLAINT FOR RELIEF FROM STATE COURT JUDGMENTS AND ORDERS ENTERED WITHOUT JURISDICTION, AND FOR INJUNCTION AND DAMAGES

EXHIBITS

[42] EXHIBITS

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A	Agreement and trustee Bank's instructions	2
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[43] AGREEMENT

THIS AGREEMENT made and entered into this 9th day of October, 1968, between JAMES STEWART COMPANY, Buyer, and JOAN H. COCKE and FRANCIS M. COCKE, Sellers, and together with that certain Escrow Agreement No. 02013111-7 entered into with Transamerica Title Insurance Company, signed by the same parties, a copy of which is attached hereto and by reference made a part hereof, constitutes the full agreement between the parties for the purchase and sale of approximately 124 acres of land, being that part of the SE 1/4 of Section 20, Township 1 North, Range 4 East, G&SRB&M, lying north of the right-of-way of the Jenkins Ditch, EXCEPT a parcel of 3-5 acres containing certain improvements of the Seller Francis M. Cocke situated at the northeast corner of the property, north of the George Ditch.

1. Sellers agree to cooperate with Buyer in altering the boundaries of any of the various 5-acre releases to fit the needs of the Buyer, and Buyer agrees that releases shall not impair access to unreleased portions of the land.

2. Seller agrees within two years to remove the farm sheds, barns, and unhoused farm implements, except for stables for three horses, from the 3-5 acres of land reserved from the sale.

3. On the parcel reserved from the sale, Seller agrees to grant easements before close of escrow for street and utility purposes, and to improve said easement by construction and paving at his cost, when streets are constructed and paved on the northeastern portion of the property for a half street on 13th Street

and a half street along the north side of the George Ditch.

4. In the event of any sale outside of Sellers' family, Sellers agree that Buyer shall have the right of first refusal (unless taken by the State of Arizona) to purchase the 11.2 acre triangle and the 12.9 acre "frog" in the south 100 acres of the SW 1/4 of Section 20, Township 1 North, Range 4 East, being Sellers' lands remaining after a portion of said 100 acres was taken by said State, and also to purchase the 3-5 acre parcel at the Northeast corner of property, reserved to Seller.

5. Buyer shall have the right to grant easements for road and utility purposes on the unreleased land. Easements for such streets [44] shall not however reduce the area of land on which release prices are computed.

6. This Agreement shall enure to the benefit of the parties hereto, their heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement the date and day first above written.

JAMES STEWART COMPANY
By
/s/ Wallace O. Tanner
BUYER Vice Pres.

s/Francis M. Cocke
FRANCIS M. COCKE

s/ Joan H. Cocke
JOAN H. COCKE
SELLERS

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 9th day of October, 1968, before me, the undersigned officer, personally appeared FRANCIS M. COCKE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Mrs. Cecelia J. Burton
Notary Public

My commission expires:
Dec. 1, 1969

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 9th day of October, 1968, before me, the undersigned officer, personally appeared JOAN H. COCKE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Mrs Cecelia J. Burton
Notary Public

My commission expires:
Dec. 1, 1969

Transamerica Title Insurance Co — A Service of Transamerica Corporation

ESCROW INSTRUCTIONS

Escrow No. 02013111-7

Phoenix, ARIZONA, October 9, 19 68 ESCROW OFFICER H. KAVANAUGH/1 woman

FRANCIS COCKE, a divorced man, and JOAN H. COCKE, a divorced woman HEREIN CALLED SELLER
(Mr. Cocke) 1320 South Priest Rd., Tempe, Arizona 967-0734
whose address is (Mrs. Cocke) Country Club Apts. #41, North 7th St Phone 266-2870
and Phoenix

JAMES STEWART COMPANY, an Arizona corporation, and/or its/ HEREIN CALLED BUYER
assignee
whose address is 144 East Country Club Dr., Phoenix, Arizona Phone
ZIP CODE

hereby employ Transamerica Title Insurance Company to act as Escrow Agent in connection with a sale by Seller to Buyer upon the following terms and conditions which shall be complied with by said parties on or before December 15th, 19 68, except as otherwise specified herein. The property herein referred to is situated in Maricopa County, Arizona, and is described as follows, to-wit:

SEE ATTACHED: EXCEPT that 3-1/2 acres (approximately) in the NE corner of Parcel No. 2, will be retained by Francis Cocke.

*** See below for additional instructions.

		ALL ITEMS CHECKED THUS (X) OR (/) ARE THE OBLIGATIONS WHICH EACH PARTY WILL PAY	SELLER	BUYER
SALES PRICE TO BE PAID BY BUYER	~~$ 558,000.00~~ 548,238.15	TAXES 1968 & prior	X	
Which is represented by:		1969 and future		X
EARNEST MONEY TO BE DEPOSITED IN ESCROW To be pd. direct to Seller upon signing these instr.	$ 10,000.00 none	Prorate to close of escrow on basis of land figure		X
CASH PAYMENT TO BE DEPOSITED IN ESCROW On or before Dec. 1, 1968.	$ 44,000.00	IMPROVEMENT LIEN ASSESSMENTS existing liens, if any	X	
		proposed liens, if any		X
MORTGAGE OF RECORD beginning with payment due with approximate unpaid balance of	$ none	Prorate to None		
Existing to remain obligation of Seller - See Schedule "A"		IRRIGATION PROJECT ASSESSMENTS Transfer, 1968 & prior	X	
		1969 & future		X
AGREEMENT FOR SALE under Escrow No. beginning with payment due with approximate unpaid balance of		Prorate to if any, close of esc.		X
		FIRE INSURANCE POLICY in the sum of $ none		
		Prorate to none		
(Any variation in amount of Mortgage or Agreement For Sale shall be reflected in		Prorate FHA INSURANCE to none		
		Prorate Interest to none		
(Any reserve funds held under said mortgage or agreement shall be	504,238.15 ~~484,238.15~~	Prorate Rents to none		
		RECORDING FEES: Deed		X
		Mortgage		X
		Agreement		
		Release of Mtge.		
		REAL ESTATE TRANSFER TAX	X	
BALANCE OF $ 496,000.00		MORTGAGE ASSUMPTION FEE		
Evidenced By Note and purchase money mortgage.		AGENT'S COMMISSION $ See schedule "A"		
Payable as follows:		TO: ARLEIGH R. BURTON, 130 East 14th Street, Tempe, Arizona		
SEE SCHEDULE "A"				
Mtg. Parcel 1 77308.39				
" " 1 77308.39				
Mtg Parcel 2 265587.21	420,203.99	ESCROW CHARGES 1/2 and 1/2	X	X
		TITLE INSURANCE CHARGES: Owners Policy	X	
appox. deficiency	84,000.00	Mortgagee Policy		
		ACCOUNTING SERVICES	1/2	1/2

Proceeds of cash payments and future payments under Agreement For Sale or Note and Mortgage, if any, to be paid to Escrow Agent for the benefit of Seller. The title to all future payments under applicable instruments, if any, shall be held by the payees indicated herein as follows:

PERSONAL PROPERTY is to be transferred as part of this transaction, and a Bill of Sale will be handed to Escrow Agent for Delivery to Buyer.

None

Upon recordation of instruments, a title insurance policy shall insure title of Buyer.

Escrow Agent is to assume no liability as to the sufficiency of said Bill of Sale or as to the title of said personalty.

ADDITIONAL INSTRUCTIONS:

***The property concerned in this escrow contains approximately 124 acres, the exact description and acreage will be furnished by a registered engineer, and the sales price and mortgage amount will be adjusted on the basis of $4,500.00 per gross acre.

72.3384
49.5023
121.8307 acres

T-4 REV. 6-68

BEST COPY AVAILABLE

BEST COPY AVAILABLE

(RetypedFine Print Escrow Instructions)
[46]
SELLER:

1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.

SELLER AND BUYER:

2. Will deliver to Escrow Agent all documents, pay to Escrow Agent all sums and do or cause to be done all other things necessary, in the sole judgment of Escrow Agent, to enable it to comply herewith and to enable Transamerica Title Insurance Company to issue any title insurance policy provided for herein.

3. Should these instructions contemplate a transfer of an interest in an agreement for sale, Seller and Buyer will deliver to Escrow Agent such documents as Escrow Agent may, in its sole judgment, require for the benefit of any party to said agreement.

4. Authorize Escrow Agent to pay, from any funds held by it for their respective credit hereunder, all amounts necessary to procure the delivery of such documents and to pay, on their behalf, all charges and obligations payable by them respectively, as specified herein.

5. Will each pay to Escrow Agent, upon demand, all charges payable by them respectively, as provided herein.

6. Authorize Escrow Agent to execute on their behalf, form assignments or other-

wise order changes in any insurance called for herein other than title insurance and forward the policies to insurer's agent with the request that the insurer consent to such transfer, attach loss payable clause or make such other additions or corrections as may be specifically required herein, and that said agent thereafter return such policies to Escrow Agent or to the parties entitled thereto.

7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

8. Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in a court of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.

9. Will indemnify and save harmless Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities, which it may incur or sustain in connection with these instructions or the escrow or any court action arising therefrom and will pay the same upon demand.

[47] 10. Grant to Escrow Agent a lien upon and authority to reimburse itself: (1) for its charges and for any damages or expenses which it may incur or sustain in connection herewith from all of the right, title and interest of either the Seller or the Buyer in all of the documents and money deposited hereunder or otherwise held by Escrow Agent: (2) for any other indebtedness due Escrow Agent from Buyer from all right, title and interest of Buyer or for any other indebtedness due Escrow Agent from Seller from all right, title and interest of Seller in all of the documents and money deposited hereunder.

11. Direct that no notice, demand or change in these instructions shall be of effect unless given in writing and that these instructions, and any subsequent instructions, given mutually by Seller and Buyer to Escrow Agent in connection herewith shall constitute the complete escrow instructions, notwithstanding any agreement which Seller and Buyer may have concerning the property.

12. Direct that all money payable hereunder be paid to Escrow Agent. Disbursement of any funds may be made by check of Escrow Agent. Escrow Agent shall be under no obligation to disburse any funds represented by check or draft, and no check or draft shall be payment to Escrow Agent in compliance with any of the requirements hereof, until it is advised by the bank in which deposited that such check or draft has been honored, unless Escrow Agent specifically agrees in writing to accept liability for the sufficiency thereof. Income, if any, earned by money deposited herein shall be retained by Escrow Agent as additional compensation.

13. Authorize Escrow Agent to act upon any statement furnished by the holder or payee, or a collection agent for the holder or payee, of any lien on or charge or assessment in connection with the property, concerning the amount of such charge or assessment or the amount secured by such lien without liability or responsibility for the accuracy of such statement. Any transfer fee, statement fee, or service fee charged by any collection agent, holder or payee shall be paid by the Seller herein unless otherwise specified.

14. Direct that when these instructions have been complied with and Transamerica Title Insurance Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver, by filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's Office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein, at which time Escrow Agent shall disburse all funds paid to it hereunder, as provided herein. Any other papers or documents may, at the option of Escrow Agent, be delivered to the party entitled thereto by mailing in the manner herein provided for mailing of "Notices, Demands or Declarations". Escrow Agent may destroy its file and contents therein after three years from close of escrow or termination of collection, as appropriate. No action against Escrow Agent arising under these instructions shall be commenced more than three years from the date the cause of action accrues.

[48] 15. Agree that the employment of Transamerica Title Insurance Company, as Escrow Agent, shall not affect any rights to which it may be subrogated under the terms of any title insurance policy issued pursuant to the provision thereof.

CANCELLATION:

16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

17. When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, Demands or Declarations.

18. In the event said other party shall fail within said thirteen-day period to comply with all the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized:

19. First: To pay to the party electing to cancel, any earnest money deposited hereunder by said other party, after deducting any charges;

20. Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;

21. Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid;

22. Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent.

23. If, under these instructions, a commission is to be paid to a real estate agent, then, notwithstanding any conflicting provisions herein contained:

(a) The party obligated to pay the commission shall not acquiesce in any mutual cancellation of these instructions without having first delivered said real estate agents written consent to Escrow Agent.

(b) Upon cancellation of these instructions for any reason, should any funds, after deducting Escrow Agent's charges, become payable to a party obligated hereunder to pay said commission, then Escrow Agent shall pay to the real estate agent therefrom, a sum equal to one-half of the earnest money deposited

by any other party and payable to the party so obligated, but not more than the full amount of such commission.

[49] 24. If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow Agent shall be returned to the parties who executed said documents. Mutually executed instruments shall be retained by Escrow Agent.

25. Notwithstanding any of the provisions herein, Escrow Agent is hereby instructed that any payments of money due under a cancellation notice shall not be accepted unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as payment in these circumstances unless approved by the party seeking cancellation.

AGREEMENT FOR SALE OF REAL PROPERTY:

26. Should any part of the amount provided to be paid by Buyer be evidenced by an agreement for sale, an executed copy thereof, the deed herein provided to be furnished by Seller, and such other documents as Escrow Agent may, in its sole

judgment, require will be delivered by Seller and Buyer to Escrow Agent which shall record said agreement and hold said deed until such time as all sums due for the account of Seller under said agreement for sale have been paid and the instructions herein have been met, at which time Escrow Agent shall deliver said deed to Buyer. In the event of a default in the agreement terms, by Buyer, Seller and Buyer hereunder, their heirs, successors, and assigns, agree that Escrow Agent may forfeit all right, title and interest of Buyer in said agreement and real property by recordation of Affidavit of Completion of Forfeiture in accordance with procedures agreed by the parties in Escrow Instructions.

27. If Buyer is in default under such agreement, Seller may either elect to bring an action against Buyer for specific performance of agreement or enforce a forfeiture thereof in any lawful manner, including, but not limited to, forfeiture by notice as hereinafter provided. Forfeiture may be enforced only after the expiration of the following periods after such default; where Buyer has paid on the purchase price: Less than 20% - 30 days; 20% or more, but less than 30% - 60 days; 30% or more, but less than 50% - 120 days; 50% or more - 9 months. In computing said percentages, the amount of any agreement for sale or mortgage agreed to be paid by Buyer shall be treated as payment only to the extent of principal actually paid thereon by Buyer.

28. If Seller elects to forfeit such agreement by notice, Seller shall do so through Escrow Agent by delivering to Escrow Agent a written Declaration of Forfeiture directed to Buyer together with Escrow

Agent's established fee for services rendered in connection with forfeitures. Said fee of Escrow Agent shall be the Buyer's obligation, shall be added to the contract balance owed by Buyer to Seller, shall be a lien upon the subject property and shall be collected by Escrow Agent [50] from Buyer in order for Buyer to avoid the forfeiture. Escrow Agent shall, within three days thereafter, send a copy of said declaration to Buyer in the manner provided herein for the mailing of Notices, Demands or Declarations. If Buyer fails to comply with the terms of such agreement to the date of such compliance before the expiration of ten days from the date said copy was deposited in the United States mail as herein provided, Escrow Agent is authorized to deliver to Seller the documents and money deposited under these instructions or under such agreement and file of record an Affidavit of Completion of Forfeiture executed by Escrow Agent, which affidavit shall be binding on all parties, their heirs, successors and assigns. All funds paid to Escrow Agent in compliance with the demands of any forfeiture notice served in connection with agreements for sale, shall be in the form of cash, cashiers check, or money order only. Personal checks will not be accepted. Said funds shall be paid to the office of Transamerica Title Insurance Company where escrow is being held. In the event any fee which is Buyer's obligation is not paid, said fee, at Escrow Agent's option, shall be deducted from funds due Seller and added to the contract balance owed Seller by Buyer. Seller may declare Buyer in default for nonpayment of said fees when due and enforce a forfeiture of said contract pursuant to the provisions contained herein.

29. In addition to the regular escrow charges made by Escrow Agent, Seller and Buyer will pay to Escrow Agent for its services in receiving, accounting for, remitting funds, terminating the account and in performing services in connection with the transmission of any Notices, Demand or Declaration required to be transmitted under the terms of the Escrow Instructions, or the agreement for sale and implementing the action contemplated or prescribed by any such Notice, Demand or Declaration, such reasonable fees as Escrow Agent has established for the various services to be performed. Said fees shall be paid one-half by Buyer and one-half by Seller unless otherwise specified herein. We reserve the right to make additional charges in unusual circumstances. All fees will be based on the rate in effect as of the date the various services are performed.

ACCOUNTING SERVICES:

30. Seller or Mortgagee as the payee of future installments which may be provided for in these instructions agrees to refund any remittance made by Escrow Agent in reliance on a check which is subsequently dishonored.

31. If a deferred balance is represented by a note secured by mortgage, the Mortgagee agrees to deposit a satisfaction of said mortgage with Escrow Agent for delivery to Mortgagor upon full payment of the note. The Mortgagee further agrees that if upon payment of said note in full you have not for any reason been furnished with a release executed by Mortgagee, you are authorized as Mortgagee's agent to mark the Promissory Note paid in full and cancelled and to execute and record a satisfaction of said mortgage.

32. In the event a note and mortgage is deposited with Escrow Agent for collection hereunder, the Mortgagee shall have the right to withdraw the note and mortgage or any modification thereof at any time without prior notice on payment of fees due Escrow Agent.

[51] 33. Time is of the essence of any agreement to pay or perform hereunder which agreement shall remain unpaid or unperformed as of close of escrow. No payment by Buyer or Mortgagor of such amounts shall be received or receipted for by Escrow Agent unless all amounts due as of the date of compliance are paid unless and until written authority therefor has been delivered to Escrow Agent by the payee of said amount.

34. No transfer or assignment of any rights hereunder shall be made by anyone having an interest herein unless made in such manner and accompanied by such instruments and fees as shall be required by the Escrow Agent.

NOTICES, DEMANDS OR DECLARATIONS:

35. The respective addresses of Seller and Buyer as set forth herein or the last notice of change thereof filed with Escrow Agent by the respective parties, shall be used by Escrow Agent in mailing any Notice, Demand or Declaration to either party.

36. If, for any reason, a Notice, Demand or Declaration of any kind is to be given by either party to the other party, said Notice, Demand or Declaration shall be in writing, signed by the party giving the Notice or making the Demand or Declaration and directed to the other party and shall be filed with Escrow Agent. Escrow

Agent shall within three days after receipt of said Notice, Demand or Declaration, send it to the party to whom it is directed by enclosing a copy of said instrument in an envelope addressed to said party at the last address which said party shall have filed with Escrow Agent, or, if no address has been so filed, to said party, in care of General Delivery, at the City in which the office of Escrow Agent is located as shown on the first page of these instructions, and depositing said envelope with proper postage affixed thereto in the United States mail.

37. The mailing of any such instrument by Escrow Agent in the manner herein provided shall constitute notice of the contents of such instrument to the party to whom the instrument is directed as of the date of such mailing and no further notice thereof shall be required.

DEFINITIONS:

38. The word "charges" as used herein, refers to all charges and advances made and obligations incurred by Escrow Agent in connection herewith, and all charges of Transamerica Title Insurance Company in connection with the issuance of its title insurance policy or the cancellation of any order therefor.

39. The word "property" as used herein, refers to the real property described in and which is the subject of these escrow instructions.

40. The word "party" as used herein, refers to Seller or Buyer as the case may be.

41. The phrase "Seller and Buyer" as used herein, refers to Seller and Buyer both jointly and severally unless otherwise specified.

[52] 42. The day provided herein within which compliance with any requirement must be met shall end at the close of the then regularly established public business hours of Escrow Agent for such day, provided, should Escrow Agent be closed during any of said business hours on said day such requirement may be met on the next succeeding day on which Escrow Agent is open for business throughout said business hours.

43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

TITLE INSURANCE:

44. The title insurance provided for herein, shall be subject to the conditions of and evidenced by the regular form of Owner's Title insurance policy of Transamerica Title Insurance Company with a limit of liability equal to the total amount to be paid by Buyer. Said policy, upon issuance, shall insure Buyer against loss by reason of defects in the title to the property on the date of filing for record of the documents as provided herein subject to such of the following exceptions as may be applicable in addition to the regular printed exceptions contained in Schedule "B" thereof:

(a) Taxes and assessments payable by Buyer as set forth herein;

(b) Building and other restrictive covenants to which property is subject;

(c) Easements and rights of way for roadways, canals, laterals, ditches and public utilities over and across the property;

(d) Mortgages referred to herein;

(e) Rights of parties under the agreement for sale referred to herein;

(f) Rights of Buyer under the agreement for sale provided for herein;

(g) Any liens or encumbrances affecting said property suffered or incurred through any act or fault of the party insured or anyone deriving an interest in said property by or through the said party insured;

(h) Liabilities and obligations imposed on the land by inclusion in any water or irrigation district;

(i) Reservations and Exceptions in Patents.

45. NOTE: There are some matters which Transamerica Title Insurance Company does not attempt to investigate or determine and for which it assumes no liability. While not a complete list, experience has shown that among these, the following deserve your particular consideration:

(a) Unrecorded mechanic's and material men's liens;

(b) Current personal property taxes;

[53] (c) Utility charges, such as electric, gas, water and sewer.

(d) Charges for irrigation water and power;

(e) Boundary lines, location of improvements and possession;

(f) Compliance with limitations on use of the property, such as zoning and building ordinances and building and other restrictions;

(g) Premiums for fire insurance policies provided for herein. (It is your obligation to determine that such premiums are paid and that such policies are in effect.)

(h) Reservations and exceptions in Patents, such, for example, as oil or mineral reservations. [54]

SCHEDULE "A" - To be attached and made a part of Escrow #02013111-7

BUYER to take possession at close of Escrow.

It is understood and agreed between Seller and Buyer that there is an existing mortgage on Parcel 2 in favor of Federal Land Bank which will remain the obligation of the Seller of Parcel 2. Seller agrees to have this mortgage released before or at the time Buyer pays off the deferred balance due under said James Stewart Company - Cocke mortgage. Seller further agrees to provide Buyer with Partial Releases on 5-acre tracts as agreed to in the James Stewart Company - Cocke mortgage.

The terms of the purchase money mortgage are as follows: $64,000.00 on January 2, 1969, plus interest on unpaid balance from date of closing and the balance to be paid over a period of not more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and including the regular annual payments, with the first such equal payment being due January 2, 1970. Buyer has the right and privilege to make additional payments at any time after January 2, 1969.

Seller agrees to execute and deliver to the escrow agent to be held in escrow, partial releases of mortgages in increments of 5-acre parcels, and the property may be released in the manner hereafter provided upon the following formula: $6,000.00 applied upon the principal for each acre

released paid upon the deferred balance due on the mortgage hereunder; EXCEPT that the property bordering on Priest Road a distance in depth of 600 feet shall bear a release price of $8,000.00 per gross acre. All releases are to be released in a contiguous manner, and the descriptions of said releases are to be furnished by a registered engineer. It is agreed between Seller and Buyer that the annual principal installments (EXCEPT the down payment of $64,000.00) shall apply toward the release price and the release prices paid for the release of land shall apply toward the next annual installment of principal. Except for annual payments of principal and interest, no interest charge shall be added to the release prices when Buyer obtains releases of lands hereunder.

These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

The Broker's commission shall be 5% of the adjusted sales price, and shall be paid by Seller as follows: $10,000.00 upon the close of escrow, and one-half of the remaining balance to be paid from the principal payment due January 2, 1970, and the balance from the principal payment due January 2, 1971. The deferred commission shall bear interest under the same terms as the note and purchase money mortgage.

Sellers of Parcel 1 and mortgagees hereunder are Francis Cocke and Joan H. Cocke. Seller of Parcel 2 and mortgagee hereunder is Francis M. Cocke.

Escrow agent shall hold all releases of mortgage in ± 5 acre tracts to be executed by Seller or Sellers, depending on whether in Parcel 1 or Parcel 2, before close of escrow. Escrow agent shall keep account of all release credits, and shall apply any available release credit as instructed by Buyer, and turn executed releases over to Buyer as tracts are cleared by application of release credit, or by payment of the release price in the following manner: Tempe Branch, First National Bank of Arizona, shall hold for collection the note and mortgage. Buyer shall remit payments of principal and interest, and release payments to said Bank and shall designate tracts to be released, so that Bank may apportion said sums between the respective Sellers. Bank shall endorse said payments on the note as collected, and shall credit the amount thereof to one or both of Sellers as instructed by Sellers and shall issue a receipt to Buyer [5] for delivery to Escrow Agent. Escrow Agent shall thereupon deliver to Buyer the executed releases of the tracts paid for by Buyer, or shall record such releases upon instruction of Buyer.

APPROVED:

s/ Francis Cocke
FRANCIS COCKE, Seller

s/ Joan H. Cocke
JOAN H. COCKE, Seller

JAMES STEWART COMPANY
By
s/ Wallace O. Tanner
WALLACE O. TANNER, VICE PRESIDENT
Buyer

/s/ Arleigh R. Burton
ARLEIGH R. BURTON, Broker [56]

LEGAL DESCRIPTION:

PARCEL NO. 1:

That property situated in the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, more particularly described as follows:

BEGINNING at a point on the East boundary line of said quarter Section, where said boundary line intersects the middle of an irrigation ditch being 323 1/2 feet South of the Northeast corner of said Quarter Section; thence running is a Southwesterly direction, following the middle line of said ditch to quarter-quarter Section line running North and South through the middle of said quarter Section; thence South, along said quarter Section line, 1287 feet to the North line of Jenkins Ditch; thence East, along said North boundary line of said Jenkins Ditch to a point on the East boundary line of said quarter Section 519 1/2 feet North of the Southeast corner thereof; thence North, along said boundary line to beginning;

EXCEPT any portion which may lie within the right-of-way of the Jenkins Ditch.

PARCEL NO. 2:

That part of the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, described as follows:

BEGINNING at the Northeast corner of the Southeast quarter of said Section 20 and running thence West, along the North line of said quarter section to the Northwest corner thereof; thence South, along the West line of said quarter section to the North bank of the Jenkins Ditch, a distance of 2090 feet, more or less; running thence East, along the North bank of the Jenkins Ditch to the quarter quarter Section line running North and South through the middle of said quarter section; thence North, along said quarter quarter section line to the center of the Cosner Ditch, also known as George Ditch, a distance of 1287 feet, more or less, running thence Easterly, along the middle of said Cosner Ditch and following the meanderings thereof to the East line of said quarter section; thence running North along said East line to the Northeast corner of said quarter section, a distance of 323 1/2 feet, more or less, to the point of commencement;

EXCEPTING THEREFROM, the following one-acre tract;

BEGINNING at the point of intersection of the North-South mid-section line of said Section 20 with the aforesaid Northerly right-of-way line of the Jenkins Ditch, said point being North 0 degrees 05 minutes 25 seconds East, 584.12 feet from the South quarter corner of said Section 20; thence North 85 degrees 05 minutes 25 seconds East, along said Northerly right-of-way line of Jenkins Ditch, a distance of 240.85 feet; thence South 89 degrees 22 minutes 35 seconds East, continuing along said Northerly right-of-way line, a distance of 131.69 feet; thence North 56 degrees 56 minutes 50 seconds West,

310.37 feet; thence North 34 degrees 59 minutes 16 seconds West, 150 feet; thence South 89 degrees 54 minutes 35 seconds West, 25 feet to the aforesaid North-South mid-section line of Section 20; thence South 0 degrees 05 minutes 25 seconds West, along said North-South mid-section line, a distance of 311.39 feet to the point of beginning, being that certain property named in Condemnation Proceedings in Cause No. 183278 in the Superior Court of the State of Arziona, County of Maricopa, entitled State of Arizona, Arizona State Highway Department, Plaintiff -vs- Francis M. Cocke, et al, Defendants, Lis Pendens of which was dated December 28, 1965, recorded January 7, 1966 in Docket 5874, Page 566; and

EXCEPT any portion of said property which may lie within the right-of-way of the Jenkins Ditch.

[57]
Transamerica Title Insurance Co.
P.O. Box 13028
Phoenix, Arizona

Re: Joan H. Cocke Trust No. 90497,
Escrow No. 02013111-7

Gentlemen:

Enclosed is a Special Warranty Deed from First National Bank of Arizona, as Trustee, to James Stewart Company which was prepared at the request of Joan H. and Francis M. Cocke.

Please place this deed in Escrow No. 02013111-7 in connection with the consummation of a sale of the subject property in accordance with escrow instructions executed by the parties and in accordance with further instructions governing the distribution of the proceeds of the sale to be furnished to your company, as escrow agent, by Joan H. Cocke and Francis M. Cocke.

Very truly yours,

FIRST NATIONAL BANK OF ARIZONA
By
/s/ George Hastings
Its: Assistant Trust Officer

[58] WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

(PARCEL NO. 2), That part of the Southeast Quarter (SE¼) of Section Twenty (20) Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; described as follows:

Beginning at a point on the North line of said SE¼ of Section 20 which bears S.89° 43'55"W. 528.00 feet from the Northeast corner of said SE¼ of Section 20; thence S.0°20'41"E. 435.44 feet to the middle of the George Ditch; thence S.76°59'43"W. 236.29 feet along the middle of the George Ditch; thence S.67°40'43"W. 211.50 feet along the middle of the George Ditch; thence S.68°31'41"W.399.54 feet along the middle of the George Ditch to a point on the West line of the E½ SE¼ of said Section 20; thence S.0°07'25"E. 1381.50 feet along the West line of the E½ SE¼ of said Section 20 to a point on the North bank of the Jenkins Ditch; thence N.88°40'37"W. 463.68 feet along the North bank of the Jenkins Ditch; thence N.89°08'43"W. 481.97 feet along the North bank of the Jenkins Ditch; thence N. 0°51'17"E. 9.00 feet; thence N.56°56'50"W. 328.73 feet; thence N.34°59'16"W. 150.00 feet; thence S.89°54'35"W. 25.00 feet to a

point on the West line of said SE¼ of Section 20; thence N.0°05'25"E. 1757.73 feet along the West line of said SE¼ of Section 20 to the Northwest corner of said SE¼ of Section 20; thence N.89°43'55"E. 2121.23 feet along the North line of said SE¼ of Section 20 to point of beginning, containing 72.3284 acres within the limits of the City of Tempe and subject to existing rights of way and easements for roads, ditches, and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the fee title against all persons whomsoever.

Dated this 30 day of December, 1968

/s/ FRANCIS M. COCKE

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 30 day of December, 1968, by

/s/ Mrs. Cecilia J. Burton
Notary Public

My commission expires:
12/12/69

[59]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt Riber Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, on account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Controlled right of access to Interstate Highway referred to in Civil No. 183278; Lis Pendens recorded in Docket 5874, page 566.

6. Mortgage executed by Francis M. Cocke to The Federal Land Bank of Berkeley to secure an indebtedness of $_____

and other amounts payable thereunder, recorded April 14, 1966 in Docket 6004, page 97, which Francis M. Cocke has agreed to pay.

Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated _____, recorded_____ _____in Docket_____, page_____.

[60] WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

An undivided one-half (½) interest in 49.5023 acres of land within the limits of the City of Tempe described as follows:

(PARCEL NO. 1) That part of the East half (E½) of the Southeast quarter (SE¼) of Section twenty (20), Township one (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the East line of said E½ SE¼ of Section 20, where said East line intersects the middle of the George Ditch, which bears S.0°20'17"E. 323.50 feet from the Northeast corner of said E½ SE¼ of Section 20; thence S.0°20'17"E. 1806.47 feet along the East line of said E½ SE¼ of Section 20 to the North bank of the Jenkins Ditch; thence N.88°40'37"W. 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said E½ SE¼ of Section 20; thence N.0° 07'25"W. 1381.50 feet along the West line of said E½ SE¼ of Section 20 to the middle of the George Ditch; thence N.68°31'41"E. 399.54 feet along the middle of the George Ditch; thence N.67°40'43"E. 211.50 feet along the middle of the George Ditch;

thence N.76°59'43"E. 375.20 feet along the middle of the George Ditch; thence N. 80°57'10"E. 195.15 feet along the middle of the George Ditch; thence N.75°14'43"E. 206.00 feet along the middle of the George Ditch to the point of beginning, subject to existing rights of way and easements for roads, ditches and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the fee title against all persons whomsoever.

Dated this 30 day of December, 1968.

/s/ FRANCIS M. COCKE

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 30 day of December, 1968, by

/s/ Mrs. Cecila J. Burton
Notary Public

My commission expires:
12/12/69

[61]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, an account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated_____, recorded_____in Docket _____, page_____.

Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

RICHARD L. THOMPSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004
(602) 254-7331

Counsel for Petitioner

VOLUME II

Pages 88 - 172

[62]

Phoenix, Arizona
Date: March 5, 1969
Escrow No. 02013111-7
Office: Main Office

James Stewart Company,
M. Seth Horne and Maurine D. Horne
c/o Wallace Tanner, Atty.
Suite 913, 3800 N. Central
Phoenix, Ariz. 85012

and
Transamerica Title Insurance Company
Escrow Agent

Gentlemen:

The instructions in the above numbered escrow having been dated October 9, 1968, and more than the time limit allowed therein having elapsed since said date, and ~~Seller~~ (Buyer) named in said escrow instructions having failed to comply with the terms thereof, the undersigned elects to cancel the escrow.

The undersigned, therefore, delivers this notice to the Escrow Agent demanding that if ~~Seller~~ (Buyer) has not complied with all of the terms of said escrow instructions within thirteen days from the date of receipt of this notice by the said Escrow Agent, said escrow shall thereupon become cancelled.

Notwithstanding any of the provisions herein, Escrow Agent is hereby instructed that any payments of money due under a cancellation notice shall not be accepted unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as

BEST COPY AVAILABLE

payment in these circumstances unless approved by the party seeking cancellation. Compliance shall be met at the office shown above.

Yours very truly,

/s/ FRANCIS M. COCKE

Received by Transamerica Title Insurance Company this 5 day of March, 1969.

/s/ H. KAVANAUGH
Escrow Officer

Form B-7 Rev. 1-68

[63]

TRANSAMERICA TITLE INSURANCE COMPANY

Date: March 6 1969

Escrow No. 02013111-7

JAMES STEWART COMPANY
C/o Wallace Tanner, Attorney
Suite 913
3800 North Central Ave.
Phoenix, Arizona 85012

Gentlemen:

The (Seller) (Buyer) under the above numberedescrow has today served us with a notice of cancellation thereof, an executed copy of which is enclosed.

Such notice having been given, you must comply with all of the terms of the escrow on or before March 19 1969, otherwise, as Escrow Agent, we must comply with the enclosed notice and the demands therein made.

Very truly yours,

TRANSAMERICA TITLE
INSURANCE COMPANY

By /s/ H. Kavanaugh
Escrow Officer

Form B-13

[64]

TANNER, JARVIS, & OWENS
Attorneys at Law
913 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012

March 5, 1969

TRANSAMERICA TITLE INSURANCE CO.
114 West Adams
Phoenix, Arizona

Attention: Mr. H. Kavanaugh
Escrow Officer

Re: Escrow No. 02013111-7

Gentlemen:

There has previously been submitted to you the down payment due in October 1968 on the above excrow. This down payment in the sum of $44,000 was the balance remaining after payment of $20,000 which was paid to the sellers outside of escrow. Twenty thousand dollars of the $44,000 on deposit was also paid directly to Francis M. Cocke to apply on his share of the down payment. It is my understanding that Mr. and Mrs. Cocke have reached an agreement as to the way these funds are to be distributed and also an agreement as to the distribution of the $64,000 payment which will be due upon this escrow being closed. According to the information we have received, they have agreed to a split of $32,000 to each of the parties. The only matter which seems to be in contention is whether Mrs. Cocke will receive

the payment directly or whether the payment will be set up in some kind of trust agreement. It is apparently the position of Mrs. Cocke that the payment is to be made to her directly and it is apparently the position of Mr. Cocke that the payments are to be maintained in some sort of trust arrangement. The buyers are not directly concerned with how Mr. and Mrs. Cocke make this division; however, the buyers are vitally concerned that some arrangement be made so that the escrow can close and and a means be provided for crediting sums to the purchase price and a means provided for obtaining parcel releases as required by the buyers.

Releases have been provided for all the acreage except parcels 1A and 2A which we understand are to be deeded to the buyers at close of escrow. The parcel releases properly executed by both Francis M. Cocke and Joan H. Cocke are to be held by the title company and released to the buyers [65] as payments are made to the First National Bank of Arizona.

Enclosed you will find the buyer's checks each in the sum of $32,000 made payable to the First National Bank of Arizona in conformity with the agreement made by Mr. and Mrs.Cocke concerning the distribution of the funds from this payment. You are authorized to deliver these sums to the First National Bank when you have accomplished the following:

1. Closed the escrow in conformity with the original agreement. Buyers' funds have been on deposit for many months and the only reason that this escrow has not been closed has apparently been the inability of the sellers to agree how pay-

ment will be distributed. This was not part of the original agreement since the buyers assumed no responsibility for this item.

2. Issued your standard title insurance policy in conformity with the agreement to the buyers.

3. Have in your possession ready for delivery to buyers each of the partial releases of mortgage submitted to you.

4. Have recorded the deeds and mortgages which deed is to include a deed to parcels 1A and 2A to the buyers.

5. Have instructions from the sellers in your possession which assures you and the buyers that upon payment by the buyers of payments hereunder that these sums will be accepted by First National Bank in conformity with the agreement and that the First National Bank will issue receipts which will be acceptable to Transamerica to apply toward release credits herein.

As stated previously, the buyers do not want to become involved in any conflict between the sellers and do not desire to take a position in any way regarding their internal handling of the payments. In conformity with the instructions which have been received and the contract, there is herewith submitted to you three (3) promissory notes and three (3) mortgages which reflect the balance due to the sellers after the annual payment which is submitted herewith. If the sellers do not desire to have the mortgages and promissory notes in the sums set forth herein or have any changes which [66] are acceptable to the title company

and to the First National Bank and which do not in any way affect buyers' rights under the agreement, buyers will be glad to cooperate in any way in accomplishing the result desired by the sellers.

If you have any questions please contact our attorney Wallace O. Tanner, 913 Del Webb Building, Phoenix, Arizona 85012.

Very truly yours,

/s/ M. S. Horne
M. S. Horne
/s/ Maurine D. Horne
Maurine D. Horne

Received this 7th day of March 1969
TRANSAMERICA TITLE INSURANCE COMPANY

By:/s/ H. Kavanaugh
Escrow Officer

Deposited in the United States Mail
this 10th day of March, 1969
TRANSAMERICA TITLE INSURANCE COMPANY

By:/s/ H. Kavanaugh
Escrow Officer

[67]

TRANSAMERICA TITLE INSURANCE COMPANY

March 10th, 1969
Escrow #02013111-7

Mr. Francis Cocke
1320 South Priest Road
Tempe, Arizona

Dear Mr. Cocke:

Enclosed is a letter that we have received from the Buyer relative to the above numbered escrow. Also, this is to acknowledge that we have received the various checks and documents mentioned in said letter.

It appears to the undersigned that the Buyer has done everything that is required of him to close this escrow.

Yours very truly

/s/ H. KAVANAUGH
Escrow Officer

HK/L

c.c.- Joan H. Cocke
Attention: Loretta Whitney

c.c - Arleigh R. Burton
130 East 14 Street
Tempe, Arizona

c.c - Walace O. Tanner
913 Del Webb Building
Phoenix, Arizona

[68]

November 27, 1972

Mr. Ray Martin, Manager,
Home Office Escrow Dept.
Transamerica Title Insurance Company
114 West Adams Street
Phoenix, ARizona 85003

Mrs. Loretta S. Whitney
Attorney-at-Law
603 Luhrs Building
Phoenix, Arizona 85003

Re: Escrow No. 02013111-7

Gentlemen:

This letter will confirm our agreement that the deposit this date of Thirty-Two Thousand and No/100 ($32,000.00) Dollars in the above-numbered escrow by James Stewart Co., an Arizona corporation, and M. Seth Horne and Maurine D. Horne constitutes full and complete compliance with regard to the second installment of $64,000.00 due under that contract dated October 9, 1968, and constitutes compliance to date of the obligation of said parties under and pursuant to the Judgment entered in James Stewart Co., an Arizona corporation, et al, vs Francis M. Cocke, C-222472, and a certain escrow with Transamerica Title Insurance Company Escrow No. 02013111-7.

It it further agreed by all the parties hereto that the deposit of said $32,000.00 represents the required sum to be deposited in escrow after offsets permitted and required by the aforesaid Judgment, and after due regard and calculation

of the equal one-half interest by Joan H. Cocke and Francis M. Cocke in the parcel to which the said $32,000.00 is to be applied.

It is further agreed by all of the parties hereto that the deposit of the aforesaid $32,000.00 with Transamerica Title Insurance Company is to be immediately re-deposited in a savings account with United Bank and to draw normal interest thereon at the rate of interest paid on ordinary savings accounts.

This deposit is being based upon the opinion of Kelly and Corbin, Lawyers, that the period for appeal for Francis M. Cocke expires at the conclusion of the business day, November 27, 1972. In the event the said Francis M. Cocke thereafter appeals from the aforesaid Judgment and is successful in sustaining appellate jurisdiction, then you shall release the $32,000.00 transmitted herewith pending Mr. Cocke's appeal.

JAMES STEWART CO., an Arizona Corportaion

M. SETH HORNE

MAURINE D. HORNE

By and through their Attorney:

/s/ Hubert E. Kelly
Hubert E. Kelly

JOAN H. COCKE

By and through her attorney:

/s/ Loretta S. Whitney
Loretta S. Whitney

TRANSAMERICA TITLE INSURANCE COMPANY

By and through its authorized agent:

/s/ Raymond B. Martin
Raymond B. Martin, Manager
Home Office Escrow Department

[69]

August 29, 1973

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Transamerica Title Insurance Company
P. O. Drawer 13028
Phoenix, Arizona 85002

Attention: Mrs. Marie Peipelman,
Escrow Officer

Attention: Mrs. Frances Bumsted Mitchell,
Legal Department

Re: James Stewart Co.,
M. Seth Horne and
Maurine D. Horne v.
Francis M. Cocke
Maricopa County,
Arizona,
Superior Court Cause
No. C-22472

Demand for Compliance with
Second Amended Judgment
Entered and filed by the
Superior Court of the
County of Maricopa on
September 27, 1972.

Gentlemen:

As you know, the plaintiffs in the above action were awarded judgment against Francis M. Cocke on September 27, 1972. This judgment provided, among other things, that the property which is the subject of your Excrow No. 02013111-7 be conveyed to the plaintiffs. From that judgment, de-

fendant Francis M. Cocke appealed, which appeal was dismissed on May 17, 1973. Thereafter, on June 13, 1973, the Court denied a motion for rehearing on its order dismissing the appellant's appeal dated May 17, 1973. From that order Mr. Cocke did not [70] file a petition for review within the time prescribed by Rule 47(b) of the Arizona Supreme Court Rules, and the litigation involving the property covered by your Escrow No. 02013111-7 is now concluded.

As you also know, in early January 1973, representatives of the plaintiffs were in your office, at which time they conferred with Mr. Martin, to whom this escrow was then assigned. And, at that time the plaintiffs deposited with Transamerica Title additional funds which were then deemed necessary by the plaintiffs and the agent of Transamerica Title to comply with the terms of the contract and escrow involved in this case in the event Mr. Cocke's appeal was untimely, as it was ultimately decided to be.

Upon conclusion of the litigation by the denial of the motion for rehearing and Mr. Cocke's failure to file a petition for review with the Supreme Court, representatives of[illegible]encouraging Transamerica Title to proceed with the closing of the escrow. Thereafter, on July 17, 1973, July 31, 1973, and August 14, 1973, the undersigned, as counsel for the James Stewart Co., M. Seth Horne and Maurine D. Horne, his wife, directed correspondence to you urging you to comply with your contractual obligations and proceed with the closing of this escrow without further delay.

I have recently been informed by Mr.

Powell B. Gillenwater, the attorney for Transamerica Title Insurance Company, that it is your position that you will not comply with your contractual obligations by closing Escrow No. 02013111-7 even though there is a valid existing judgment of the Superior Court of Arizona in favor of the above plaintiffs directing, among other things, that they are to receive conveyance of the property which is the subject of this escrow.

As counsel for the above-named plaintiffs, I hereby demand that you proceed to honor your contractual obligations and close Escrow No. 02013111-7. In the event you do not take action immediately, I will proceed on behalf of the plaintiffs for such relief as is permissible in the [71] premises under Rules 70 and 71 of the Arizona Rules of Civil Procedure. Furthermore, I will hold Transamerica Title Insurance Company responsible for any and all damages resulting to James Stewart Co. and M. Seth Horne and Maurine D. Horne, his wife, or any of them, by reason of your unilateral failure to honor the contractual obligations of Escrow No. 02013111-7.

Very truly yours,

HEK:lh
cc: Mr. Powell B. Gillenwater
Browder & Gillenwater
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

[72] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al,	)	
Plaintiffs,	)	No. C 222472
vs.	)	SUMMARY
FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman,	)	JUDGMENTS
Defendants,	)	(Filed: 11/10/70)
vs.	)	
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation,	)	
Additional Defendant on Counterclaim.	)	

This matter having come on regularly to be heard on October 22, 1970, on the motion of Transamerica Title Insurance Company for summary judgment in its favor on the counterclaim of Francis M. Cocke, and for Transamerica's motion for summary judgment in its favor against the defendant Cocke for Attorney's fees and costs incurred by Transamerica; and the defendant Cocke having been present in person and both parties having been represented by counsel, and extensive memoranda having been filed herein, and the Court having reviewed the same and having heard oral argument in reference to both motions, and the Court having held an additional hearing on October 22, 1970, for the purpose of determining the amount of reasonable

attorney's fees and costs due Transamerica Title Insurance Company and determining the motion for rehearing of Francis M. Cocke, and evidence having been presented as to the necessity and reasonableness of attorney's [73] fees incurred, and the oral argument having been presented on the motion for rehearing, and the Court being fully advised in the premises, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that there are no genuine issues of fact and that Transamerica Title Insurance Company is entitled to and hereby is awarded summary judgment against the defendant Francis M. Cocke on his counterclaim against Transamerica Title Insurance Company. It is

FURTHER ORDERED, ADJUDGED AND DECREED that there is no genuine issue of fact except as to the amount of attorney's fees, which has been determined at a hearing provided therefor, and that Transamerica Title Insurance Company is entitled to summary judgment on its counterclaim against the defendant Cocke for attorney's fees in the amount of $4,568.00 and its partial costs incurred herein in the amount of $104.71, and Transamerica Title Insurance Company is hereby granted leave to file a statement of costs for depositions and other costs incurred in connection with this action after the entry of this formal written judgment. It is

FURTHER ORDERED, ADJUDGED AND DECREED that the motion for rehearing filed herein by the defendant Cocke in reference to the summary judgments herein provided be and the same hereby is denied. It is

FURTHER ORDERED, ADJUDGED AND DECREED that although there are multiple claims and multiple parties, there is no just reason for delay in the entry of this judgment, and the Court does hereby pursuant to Rule 54(b) Rules of Civil Procedure, expressly direct the entry of this judgment.

DATED this 10th day of November, 1970.

s/ Irwin Cantor
Irwin Cantor
Judge of the Superior Court

[74]
The original of the foregoing Judgment lodged with the Honorable Irwin Cantor this 22nd day of October, 1970, and copies thereof delivered to the following on the 22nd day of October, 1970:

L. Alton Riggs, Jr.
Johnson Shelley Roberts & Riggs
Attorneys for Defendant Cocke
48 N. Macdonald
Mesa, Arizona 85201

Wallace O. Tanner
Tanner Jarvis Owens & Hoyt
Attorneys for James Stewart Co.,
M. Seth Horne and Maurine D. Horne
913 Del Webb Building
Phoenix, Arizona 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

George Sorenson, Jr.
Minne & Sorenson
Attorneys for Elizabeth C. Cocke and
Dorothy J. Cocke, and Guardian Ad Litem
of Elizabeth Cocke
609 Luhrs Building
Phoenix, Arizona 85003

s/ Powell B. Gillenwater
Powell B. Gillenwater

[75] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al,	)	
Plaintiffs,	)	
vs.	)	
FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman,	)	No. C 222472
Defendants,	)	(Filed:
vs.	)	Nov 1970)
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation,	)	
Additional Defendant on Counterclaim.	)	

JUDGMENT IN FAVOR OF CROSS-DEFENDANT, JOAN H. COCKE AND AGAINST CROSS-CLAIMANT FRANCIS M. COCKE

This matter having come on regularly to be heard on September 2, 1969, and the Court having ordered that the motion of the defendant, Joan H. Cocke, to dismiss the cross-claim of the defendant, Francis M. Cocke, on the grounds of lack of jurisdiction and failure to state a claim shall be held in abeyance until the amended pleading by the defendant, Francis M. Cocke, has been filed; and Joan H. Cocke having been allowed ten (10) days after the filing of the amended pleading by the defendant, Francis M. Cocke, to file any response to the amended pleading filed by the defendant, Francis M. Cocke; and

the defendant, Francis M. Cocke, having failed to amend his cross-claim against the cross-defendant, Joan H. Cocke; and Joan H. Cocke having filed a new motion for judgment in her favor as cross-defendant and against the cross-claimant, Francis M. Cocke, on the 2nd day of October, 1969; and the Court having ordered that said new motion be heard on November 20, 1969, and said hearing having been duly continued by said Court to November 28, 1969; and said hearing on the motion for judgment in favor of the cross-defendant, Joan H. Cocke, and [76] against the cross-claimant, Francis M. Cocke, having come on regularly for hearing with the motions of other parties in said action on November 28, 1969; and all parties being present and additional memorandums being filed by cross-claimant, Francis M. Cocke, and oral arguments having been heard on said date, the Court took under advisement the motion for judgment of the cross-defendant, Joan H. Cocke, in her favor and against the cross-claimant, Francis M. Cocke; and on December 1, 1969, the Court being fully advised in the premises entered an Order granting the motion for judgment in favor of the cross-defendant, Joan H. Cocke and against the cross-claimant, Francis M. Cocke,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that the motion for judgment in favor of the cross-defendant, Joan H. Cocke, and against the cross-claimant, Francis M. Cocke, be, and the same hereby is, granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that although there are multiple claims and multiple parties, there is no just

reason for delay in the entry of this judgment, and the Court does hereby, pursuant to Rule 54(b) Rules of Civil Procedure, expressly direct the entry of this judgment.

DATED THIS ____ day of November, 1970.

/s/ Irwin Cantor
Irwin Cantor
Judge of the Superior Court

The original of the foregoing Judgment lodged with the Honorable Irwin Cantor this ____ day of November, 1970, and copies thereof delivered to the following on the _____ day of November, 1970:

L. Alton Riggs, Jr.
Johnson Shelley Roberts & Riggs
Attorneys for Defendant Cocke
48 North Macdonald
Mesa, Arizona 85201

[77]
Wallace O. Tanner
Tanner Jarvis Owens & Hoyt
Attorneys for James Stewart Co.,
M. Seth Horne and Maurine D. Horne
913 Del Webb Building
Phoenix, Arizona 85012

Powell B. Gillenwater
Browder Gillenwater & Daughton
Attorney for Transamerica Title
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

George Sorrenson, Jr.
Minne & Sorenson
Attorneys for Elizabeth C. Cocke and
Dorothy J. Cocke, and Guardian Ad Litem

of Elizabeth Cocke
609 Luhrs Building
Phoenix, Arizona 85003

Loretta S. Whitney

[78] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants. vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	)	No. C 222472 (Filed: 7/26/72)

PLAINTIFFS' AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND SECOND AMENDED JUDGMENT

COMES NOW the Plaintiffs, and pursuant to the order of this Court dated April 20, 1972, submits hereby its amended proposed finds of fact, conclusions of law and second amended judgment.

FINDINGS OF FACT

The Plaintiffs propose that the Court make, from the evidence, the following findings of fact.

1. On October 9, 1968, JAMES STEWART COMPANY, hereinafter referred to as STEWART, entered into a real estate contract and

escrow agreement to purchase approximately 124 acres of land from the Defendant FRANCIS M. COCKE, hereinafter referred to as COCKE, and JOAN H. COCKE.

[79] 2. STEWART subsequently assigned its contractual rights to M. SETH HORNE and MAURINE D. HORNE, hereinafter referred to as HORNES.

3. Under the terms of the contract, the sales price for the property was $558,000 payable $20,000 upon the signing of the contract; $44,000 on or before December 1, 1968; $64,000 on January 2, 1969, plus interest on the unpaid balance from the date of closing; and the balance to be paid over a period of not more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and included in the regular annual payments, with the first such equal payment being due January 2, 1970. The sales price for the property was ultimately reduced to $548,238.15 based upon a survey by a registered engineer to determine the exact description and acreage. The sales price and mortgage amounts were to be adjusted on the basis of that survey at $4,500 per gross acre.

4. The unpaid balance was to be secured by a note and mortgage of Plaintiffs to the Defendants COCKE and JOAN H. COCKE, who agreed to execute partial releases of the mortgages in increments of 5-acre parcels upon payment of $6,000 per acre, except for that portion of the property bordering on Priest Road a distance in depth of 600 feet which bore a release price of $8,000 per acre. The Plaintiffs had the right of pre-payment at any time

after January 2, 1970.

5. At the time that the real estate contract and escrow instructions were entered into, COCKE was informed that the property was being acquired for the purposes of development.

6. Pursuant to the contract, on October 9, 1968, the Plaintiffs paid the Defendant COCKE and JOAN H. COCKE $20,000 and on December 11, 1968, they paid into escrow with the Transamerica Title Insurance Company $44,000 of which $20,000 was [80] paid out of escrow to the Defendant COCKE on or about January 10, 1969.

7. Plaintiffs have been ready at all times to close this transaction since December 15, 1968, the date set forth in the escrow instructions, or any time thereafter.

8. Also, Defendant JOAN H. COCKE has been ready to perform since December 15, 1968, and thereafter, and has admitted her obligation to perform under the contract.

9. COCKE has refused to convey the property to STEWART or to the HORNES.

10. As a result of COCKE's failure to convey as provided by the contract, Plaintiffs incurred damages as follows:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

11. These damages were incurred by Plaintiffs because of Defendant COCKE's failure to convey, and are costs which were preliminary to the development of the property, and are no longer usuable or otherwise recoverable by Plaintiffs.

12. These preliminary costs incurred by Plaintiffs were within the contemplation of Defendant COCKE at the time the contract of October 9, 1968, was entered into.

13. On December 8, 1970, this Court granted the Plaintiffs' motion for summary judgment awarding Plaintiffs specific performance of the contract dated October 9, 1968, against Defendant COCKE.

14. However, since December 8, 1970, COCKE has refused and still refuses to convey the property which he and JOAN H. COCKE agreed to sell to STEWART and which he had been ordered to convey by the Court.

CONCLUSIONS OF LAW

The Plaintiffs propose that the Court make the following [81] conclusions of law:

1. That Plaintiffs are entitled to specific performance against the Defendant COCKE as ordered by the Court on December 8, 1970, granting the Plaintiffs' motion for summary judgment.

2. The damages incurred by Plaintiffs in the sum of Forty-seven Thousand Four and 86/100 Dollars ($47,004.86), consisting of:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

were incurred as a result of Defendant FRANCIS M. COCKE's failure to convey to Plantiffs, said damages being within the contemplation of Defendant FRANCIS M. COCKE at the time he entered into this transaction.

3. That Plaintiffs have and recover their costs of suit herein against the Defendant FRANCIS M. COCKE in the amount of One Thousand Four Hundred Sixty-three and 51/100 Dollars ($1,463.51).

Respectfully submitted,
KELLY and CORBIN
By
/s/ Hurbert E. Kelly
Hubert E. Kelly
3003 N. Central
Suite 2300
Phoenix, Arizona 85012
Attorneys for Plaintiffs

Copy of the foregoing lodged with the Court this 26th day of July, 1972, and mailed same date to:

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s/Hubert E. Kelly
Hubert E. Kelly

[83] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMAPNY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants. vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendants on Counterclaim.	)	No. C 222472 (Filed: 9/27/72)

SECOND AMENDED JUDGMENT

This cause seeking specific performance of an agreement for the purchase and sale of certain real estate located in the State of Arizona, County of Maricopa, legally described as:

PARCEL NO. 1: That part of the East half of the South east quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said

East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the [84] George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of

Section 20 which bears South 89° 43' 55" West 528.00 feet from the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481.97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23 feet along the North line of said Southeast quarter of Section 20 to the point of beginning.

a copy of said agreement being attached to the complaint, and damages, the specific performance having been granted by the Court on December 8, 1970, against the Defendant FRANCIS M. COCKE upon the Plaintiff's motion for summary judgment, and the question of damages coming on regularly for trial before the Court sitting without a jury, commencing on the 28th day of February, 1972, Plaintiffs appearing by their attorneys, HUBERT E. KELLY and CHARLES L. ARNOLD, the Defendant FRANCIS M. COCKE appearing by and through his attorney, L. ALTON RIGGS, JR., and the Defendant JOAN H. COCKE appearing by and through her attorney, LORETTA WHITNEY, and the Court having heard the testimony and having examined the proof offered by the respective parties, and having taken this matter under [85] advisement finds, to-wit:

1. On October 9, 1968, JAMES STEWART COMPANY hereinafter referred to as STEWART, entered into a real estate contract and escrow agreement to purchase approximately 124 acres of land from the Defendant FRANCIS M. COCKE, hereinafter referred to as COCKE, and JOAN H. COCKE.

2. STEWART subsequently assigned its contractual rights to M. SETH HORNE and MAURINE D. HORNE, hereinafter referred to as HORNES.

3. Under the terms of the contract, the sales price for the property was $558,000 payable $20,000 upon the signing of the Contract; $44,000 on or before December 1, 1968; $64,000 on January 2, 1969, plus interest on the unpaid balance from the date of closing; and the balance to be paid over a period of not

more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and included in the regular annual payments, with the first such equal payment being due January 2, 1970. The sales price for the property was ultimately reduced to $548,238.15 based upon a survey by a registered engineer to determine the exact description and acreage. The sales price and mortgage amounts were to be adjusted on the basis of that survey at $4,500 per gross acre.

4. The unpaid balance was to be secured by a note and mortgage of Plaintiffs to the Defendants COCKE and JOAN H. COCKE, who agreed to execute partial releases of the mortgages in increments of 5-acre parcels upon payment of $6,000 per acre, except for the portion of the property bordering on Priest Road a distance in depth of 600 feet which bore a release price of $8,000 per acre. The Plaintiffs had the right of pre-payment at any time after January 2, 1970.

[86] 5. At the time that the real estate contract and escrow instructions were entered into, COCKE was informed that the property was being acquired for the purposes of development.

6. Pursuant to the contract, on October 9, 1968, the Plaintiffs paid the Defendants COCKE and JOAN H. COCKE $20,000 [87] and on December 11, 1968, they paid into escrow with the Transamerica Title Insurance Company $44,000 on which $20,000 was paid out of escrow to the Defendant COCKE on or about January 10, 1969.

7. Plaintiffs have been ready at all times to close this transaction since December 15, 1968, the date set forth in the escrow instructions, or anytime thereafter.

8. Also, Defendant JOAN H. COCKE has been ready to perform since December 15, 1968, and thereafter, and has admitted her obligation to perform under the contract.

9. COCKE has refused to perform the agreement for the purchase and sale and convey the property to STEWART or to the HORNES.

10. As a result of COCKE's failure to perform the agreement for the purchase and sale and convey the property as provided by the contract, Plaintiffs incurred damages as follows:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

11. These damages were incurred by Plaintiffs because of Defendant COCKE's failure to perform the agreement for the purchase and sale, and convey the said land as provided by the contract, and are costs which were preliminary to the development of the property, and are no longer usable or otherwise recoverable by

Plaintiffs.

12. These preliminary costs incurred by Plaintiffs were within the contemplation of Defendant COCKE at the time the contract of October 9, 1968, was entered into.

13. On December 8, 1970, this Court granted the Plaintiffs' motion for summary judgment awarding Plaintiffs specific performance of the contract dated October 9, 1968, against Defendant COCKE.

[88] 14. However, since December 8, 1970, COCKE has refused and still refuses to perform the agreement for the purchase and sale and convey the property which he and JOAN H. COCKE agreed to sell to STEWART and which he had been ordered to convey by the Court.

And the Court further finds as conclusions of law the following:

1. The Plaintiffs are entitled to specific performance against the Defendant COCKE as ordered by the Court on December 8, 1970, granting the Plaintiff's motion for summary judgment.

2. The damages incurred by Plaintiffs in the sum of Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), consisting of:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

were incurred as a result of Defendant FRANCIS M. COCKE's failure to convey to Plaintiffs, said damages being within the contemplation of Defendant FRANCIS M. COCKE at the time he entered into this transaction.

3. That Plaintiffs have and recover their costs of suit herein against the Defendant FRANCIS M. COCKE in the amount of One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51).

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED granting Plaintiffs' motion for summary judgment against Defendant FRANCIS M. COCKE, thereby requiring Defendant FRANCIS M. COCKE to specifically perform the contract entered into by the parties on October 9, 1968, all as prayed for in Plaintiffs' complaint, to convey the following described real estate, to-wit:

PARCEL NO. 1: That part of the East half of the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

[89] BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of

said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence North 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of Section 20 which bears South 89° 43' 55" West 528.00 feet from

the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481.97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23

feet along the North line of said Southeast quarter of Section 20 to the point of beginning.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of Forty-Seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), said amount being for:

[90] CONSULTING AND ARCHITECTURAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting Plaintiffs' costs of suit taxed at One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), plus interest as provided by law until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the expiration of the period for appeal herein as provided by Rule 73(b) of the Arizona Rules of Civil Procedure, Plaintiffs shall pay into the escrow account established with the Transamerica Title Insurance Company the sum of Sixty-four Thousand Dollars ($64,000) repre-

senting the second installment due from Plaintiffs on January 2, 1969, against which the Plaintiffs may set off against the Defendant FRANCIS M. COCKE's interest in the purchase money proceeds, the damages due them by said Defendant FRANCIS M. COCKE, as well as their costs of suit herein, viz: Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86) and One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), respectively, plus interest as provided by law until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be paid over to the Plaintiffs the sum of Twenty-four Thousand Dollars ($24,000) to the extent of the interest of the Defendant FRANCIS M. COCKE therein, now on deposit in the escrow with the Transamerica Title Insurance Company less charges for said escrow applicable to the closing of the interest of the Defendant FRANCIS M. COCKE in subject property, such sum representing the Defendant FRANCIS M. COCKE's interest in such purchase money proceeds against which the Plaintiffs shall set off for the balance of any remaining damages due them by said Defendant FRANCIS M. COCKE, if any, as well as their costs of [91] suit herein, viz: Forty-seven Thousand Four Dollars and Eight-six Cents ($47,004.86) and One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), respectively, plus interest as provided by law until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall set off the balance of any damages due them by the Defendant FRANCIS M. COCKE, their costs of suit herein, plus interest as

provided by law until paid, against any further installment payments of the purchase price of said real estate to the extent of the Defendant FRANCIS M. COCKE's interest in said purchase money proceeds until the full amount of said damages and costs of suit are paid in full plus interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said [92] contract as modified hereby.

DONE IN OPEN COURT this 27th day of September, 1972.

/s/ Irwin Cantor
Judge of the Superior Court

Copy of the foregoing Second Amended Judgment lodged with the Court this 26th day of July, 1972, and mailed on same date to:

Powell B. Gillenwater
Browder & Gillenwater
Attorneys for Transamerica Title
3003 N. Central, Suite 2304
Phoenix, AZ 85012

Loretta Whitney
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Phoenix, AZ 85003

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and Elizabeth C. Cocke
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Phoenix, AZ 85003

L. Alton Riggs, Jr.
Attorney for F. M. Cocke
48 N. Macdonald Street
Mesa, AZ 85201

/s/ Herbert E. Kelly

[93] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	)	No. C 222472 (Filed: 9/7/73)

APPLICATION FOR WRIT OF ASSISTANCE, OR, ALTERNATIVELY, FOR AN ORDER REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR FOR A SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife, pursuant to Rules 70 and 71 of the Arizona Rules of Civil Procedure, hereby make application for a writ of assistance, or, in the alternative, for an order requiring compliance with the judgment entered by this Court on September 27, 1972, or for a supplemental bill enforcing said judgment, and respectfully state unto the Court as follows:

1. On September 27, 1972, this

Court entered and filed its Second Amended Judgment in the above-captioned action, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference as though fully set forth.

2. Said action arose out of defendant Francis M. Cocke's refusal to specifically perform a contract entered into on October 9, 1968, between James Stewart Company as buyer and Francis M. Cocke and Joan H. Cocke as sellers, a copy of which is attached hereto as Exhibit "B" and incorporated herein by [94] reference as though fully set forth; and Escrow No. 02013111-7, a copy of which is attached hereto as Exhibit "C" and incorporated herein by reference as though fully set forth.

3. The judgment referred to in Paragraph 1 above (hereinafter referred to as "the judgment") provided, inter alia, as follows:

> "NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED granting Plaintiffs' motion for summary judgment against Defendant FRANCIS M. COCKE, thereby requiring Defendant FRANCIS M. COCKE to specifically perform the contract entered into by the parties on October 9, 1968, all as prayed for in Plaintiffs' complaint, to convey the following described real estate, to-wit:
>
> "PARCEL NO. 1 That part of the East half of the Southeast quarter of Section Twenty (20), Township One (1) North, Range

Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence North 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

"PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of Section 20 which bears South 89° 43' 55" West 528.00 feet from the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the [95] middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481. 97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence

South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23 feet along the North line of said Southeast quarter of Section 20 to the point of beginning."

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86), said amount being for:

"CONSULTING AND ARCHITECTURAL FEES - $ 6,349.00

"SALARIES AND OFFICE OVERHEAD - $18,895.86

"INTEREST ON MONEY IN PROJECT - $21,760.00

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting Plaintiffs' costs of suit taxed at One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), plus interest as provided by law until paid.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the expiration of the period for appeal herein as provided by Rule 73(b) of the Arizona Rules of Civil Procedure, Plaintiffs shall pay into the escrow account established with the Transamerica Title Insurance Company the sum of Sixty-Four Thousand Dollars ($64,000), representing the second installment due from Plaintiffs on January 2, 1969, against which the Plaintiffs may set off against the Defendant FRANCIS M. COCKE's interest in the purchase money proceeds, the damages due them by said Defendant FRANCIS M. COCKE, as well as their costs of suit herein, viz: Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86) and One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), respectively, plus interest as provided by law until paid; [96]

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be paid over to the Plaintiffs the sum of Twenty-Four Thousand Dollars ($24,000) to the extent of the interest of the Defendant FRANCIS M. COCKE therein, now on deposit in the escrow with the Transamerica Title Insurance Company less charges for said escrow applicable to the closing of the interest of the Defendant FRANCIS M. COCKE in subject property, such sum representing the Defendant FRANCIS M. COCKE's interest in such purchase money proceeds against which the

Plaintiffs shall set off for the balance of any remaining damages due them by said Defendant FRANCIS M. COCKE, if any, as well as their costs of suit herein, viz: Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86) and One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), respectively, plus interest as provided by law until paid;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall set off the balance of any damages due them by the Defendant FRANCIS M. COCKE, their costs of suit herein, plus interest as provided by law until paid, against any further installment payments of the purchase price of said real estate to the extent of the Defendant FRANCIS M. COCKE's interest in said purchase money proceeds until the full amount of said damages and costs of suit are paid in full plus interest as provided by law.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73 (b) of the Arizona Rules of Civil Procedure.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE

shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby."

(Emphasis added.)

4. On October 10, 1972, defendant FRANCIS M. COCKE filed with this Court a motion to vacate the judgment, which motion was denied by the court on November 6, 1972, and the denial of such motion reaffirmed on November 8, 1972. [97]

5. On November 27, 1972, plaintiffs, in compliance with the judgment, contract and Escrow No. 02013111-7, paid over to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, the sum of $32,000 representing the balance of the second installment of $64,000 due from plaintiffs on January 2, 1969, after offsetting against the interest therein of FRANCIS M. COCKE the sum of $32,000 for the damages and costs awarded plaintiffs against defendant FRANCIS M. COCKE as set forth in the judgment.

6. On January 4, 1973, defendant FRANCIS M. COCKE filed a notice of appeal from the judgment entered on September 27, 1972, with the Clerk of the Court, and on January 8, 1973, plaintiffs filed their notice of cross appeal from the judgment.

7. On March 7, 1973, plaintiffs filed their motion to dismiss the appeal of defendant FRANCIS M. COCKE on the grounds that said appeal was untimely, and on May 17, 1973, the Court of Appeals of the State of Arizona dismissed the appeal of defendant FRANCIS M. COCKE on those grounds. Thereafter, on June 13, 1973, the Court of Appeals denied a motion for rehearing filed by defendant FRANCIS M. COCKE from the order of that Court of May 17, 1973, dismissing his appeal. On July 5, 1973, the Court of Appeals dismissed the cross appeal filed by plaintiffs on its own motion. Attached hereto and marked as Exhibits "D," "E" and "F," respectively, and incorporated herein as though fully set forth, are copies of the orders entered by Division One of the Court of Appeals for the State of Arizona on May 17, 1973, June 13, 1973, and July 5, 1973. Defendant FRANCIS M. COCKE did not thereafter file a petition for review with the Supreme Court of Arizona from the order of the Court of Appeals of June 13, 1973, within the time prescribed by Rule 47 (b) of the Rules of the Supreme Court of Arizona, nor did plaintiffs file a petition for review from the order of the Court of Appeals of July 5, 1973, within such time. [98]

8. After the expiration of the period of time for defendant FRANCIS M. COCKE to file a petition for review with the Supreme Court of Arizona, counsel for plaintiffs called Mr. L. Alton Riggs, Jr., counsel

for defendant FRANCIS M. COCKE, for the purpose of inquiring whether defendant FRANCIS M, COCKE would proceed to close Escrow No. 02013111-7 in compliance with the judgment, and plaintiffs' counsel was informed that defendant FRANCIS M. COCKE was farming in New Mexico and that his counsel did not know whether or not he intended to comply with the judgment. Thereafter, on July 17, 1973, July 31, 1973, and August 14, 1973, counsel for plaintiffs sent letters to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, requesting that said counterdefendant proceed with the closing of said escrow. Attached hereto and marked as Exhibits "G," "H" and "I," respectively, are copies of the aforementioned letters which are incorporated herein by reference as though fully set forth. On August 21, 1973, at a conference attended by counsel and the agent for counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, and counsel for plaintiffs, counsel for plaintiffs was informed that counterdefendant would not proceed to close Escrow No. 02013111-7 in compliance with the judgment. Also on said date, counsel for plaintiffs called Mr. L. Alton Riggs, Jr., counsel for defendant FRANCIS M. COCKE, and requested that counsel obtain the authorization of defendant FRANCIS M. COCKE for counterdefendant to proceed with the closing as required by the judgment, at which time counsel for defendant FRANCIS M. COCKE refused to call defendant FRANCIS M. COCKE for such purpose. Thereafter, on August 29, 1973, counsel for plaintiffs was informed by Mr. Powell B. Gillenwater, counsel for counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, that said counterdefendant would not proceed to close Escrow No. 02013111-7 without (1) authorization of defendant FRANCIS M. COCKE to do so [99] or (2) an order of this Court

requiring said counterdefendant to proceed to close said escrow in compliance with the judgment entered September 27, 1972.

9. On August 29, 1973, counsel for plaintiffs sent to defendant FRANCIS M. COCKE at his last known address, 1320 South Priest Road, Tempe, Arizona 85281, and in care of his attorney, Alton Riggs, at 1540 East University, Suite 200, Mesa, Arizona 85201, and to said Alton Riggs individually, a demand for compliance with the Second Amended Judgment entered and filed by the Superior Court of the County of Maricopa on September 27, 1972, a copy of which is attached hereto and marked as Exhibit "J" and incorporated herein by reference as though fully set forth. Said demand was sent by counsel for plaintiffs by certified mail, return receipt requested, postage prepaid. Also on August 29, 1973, counsel for plaintiffs sent to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, P. O. Drawer 13028, Phoenix, Arizona 85002, a demand for compliance with the Second Amended Judgment entered and filed by the Superior Court of the County of Maricopa on September 27, 1972, a copy of which is attached hereto and marked as Exhibit "K" and incorporated herein by reference as though fully set forth. Said demand was sent by counsel for plaintiffs by certified mail, return receipt requested, postage prepaid.

10. There is presently pending in the Court of Appeals of the State of Arizona, Division One, an appeal by defendant FRANCIS M. COCKE against counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, under Docket No. 1 CA-CIV 2306, in which appeal defendant FRANCIS M. COCKE is appealing a judgment entered by this Court on

November 6, 1972, in which appeal the defendant, FRANCIS M. COCKE, continues to question the propriety in which Escrow No. 02013111-7 was handled by counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, and said appeal [100] has not as of the date of filing of this application been concluded.

11. Inasmuch as the appeal by defendant FRANCIS M. COCKE from the judgment entered against him on September 27, 1972, in favor of plaintiffs has now been concluded and by reason of the refusal of defendant FRANCIS M. COCKE to comply with said judgment, and, further, by reason of the refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed to close Escrow No. 02013111-7, plaintiffs are now being placed in the position of being unable to further comply with the terms of said judgment and, indeed, are being deprived of the property rights awarded to them under the judgment dated September 27, 1972.

12. In the opinion of plaintiffs, it is necessary and proper that a writ of assistance requiring counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to comply with the judgment of September 27, 1972, or an order or such other supplemental bill or writ, be issued to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, or such other proper officer, directing that Escrow No. 02013111-7 be closed in accordance with (1) the judgment entered by this Court on September 27, 1972, (2) the contract entered into on October 9, 1968, by and between James Stewart Company and defendants, Francis M. Cocke and Joan H. Cocke, and (3) the escrow instructions entered into by plaintiffs and defendants with counterdefendant on October 9, 1968.

Such writ of assistance, order or supplemental bill, or such other writ as deemed necessary and proper in the premises, should comply with the terms of the aforesaid contract and escrow instructions, except as modified by the judgment of the Court entered on September 27, 1972, and should provide plaintiffs with such relief as is necessary to effectuate the closing of the escrow in accordance with the terms of the aforesaid contract and [101] escrow instructions as modified by the judgment, including but not limited to the appointment of such person or officer of the Court to do any and all things necessary for compliance with the terms of the aforesaid contract and escrow instructions, specifically including the agreements between plaintiffs and defendants as set forth in Paragraphs 1 and 3 of the contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of Escrow No. 02013111-7. In the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided for by said escrow instructions, as set forth in the last paragraph of Schedule "A" attached and made a part of Escrow No. 02013111-7, then such writ, order or other supplemental bill or writ should provide for the appointment of some other depository to act for such purpose, or provide for the note and mortgage to be held by the Clerk of the Court and payments thereon to be received by the Clerk for distribution to defendants according to their respective interests.

13. In the event of the inability or refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed with the closing of Escrow No. 02013111-7, the

writ of assistance herein requested, or such other order, supplemental bill or writ as the Court deems necessary and proper in the premises, should provide for the appointment of a substitute escrow agent to act in the place and stead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, said substitute escrow agent to act in accordance with the aforesaid contract and escrow instructions as modified by the judgment and to be substituted with the rights, privileges and duties of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, The TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated to plaintiffs its willingness to be appointed as such substitute [102] escrow agent to act for and instead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, pursuant to order of Court, said TITLE INSURANCE COMPANY OF MINNESOTA to be substituted with the rights, duties and privileges of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, as set forth in the contract dated October 9, 1968, and Escrow No. 02013111-7 dated October 9, 1968, as modified by the judgment dated September 27, 1972, and such instructions as are issued by the Court in such writ, order or supplemental bill or writ as may be issued by the Court.

WHEREFORE, plaintiffs pray as follows:

1. That a writ of assistance, or an order, or such other supplemental bill or writ, be issued out of this Court ordering counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to comply with the judgment of this Court entered on September 27, 1972, and directing that Escrow No. 02013111-7 be closed in accordance with (1) the judgment entered by this Court on September 27, 1972, (2) the contract entered into on October 9,

1968, by and between James Stewart Company and defendants, Francis M. Cocke and Joan H. Cocke, and (3) the escrow instructions entered into by plaintiffs and defendants with counterdefendant on October 9, 1968.

2. That such writ of assistance, or order, or such other supplemental bill or writ as deemed necessary and proper by the Court in the premises, should direct compliance with the terms of the contract and escrow instructions dated October 9, 1968, except as modified by the judgment of the Court entered on September 27, 1972, and provide plaintiffs with such relief as is necessary to effectuate the closing of Escrow No. 02013111-7 in accordance with the terms of the aforesaid contract and escrow instructions as modified by the judgment of September 27, 1972, including but not limited to the appointment of such person or persons, officer or officers of the Court to do any and all things [103] necessary for compliance with the terms of the aforesaid contract and escrow instructions No. 02013111-7, specifically providing that the agreements between plaintiffs and defendants as set forth in Paragraphs 1 and 3 of the contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of escrow instructions No. 02013111-7 be performed.

3. In the alternative, in the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided by said escrow instructions, that the Court appoint some other depository to act for such purpose, or direct that the note and mortgage be held by the Clerk of the Court and payments thereon be made to the Clerk

for distribution to defendants according to their respective interests.

4. In the alternative, in the event of the inability or refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed with the closing of Escrow No. 02013111-7 as directed by such writ of assistance, order or such other supplemental bill or writ as shall issue from this Court, that the Court appoint as an officer of this Court a substitute escrow agent to act in the place and stead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, said substitute escrow agent to act in accordance with the aforesaid contract and escrow instructions No. 02013111-7, as modified by the judgment entered September 27, 1972, and to be substituted with all rights, privileges and duties of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY.

5. For such other and further relief as the Court deems necessary and proper in the premises.

Respectfully submitted, [104]

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
Attorney for Plaintiffs

[105] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant On Counterclaim.	)	No. C 222472
	)	Filed: 10/31/73

ORDER GRANTING APPLICATION FOR WRIT OF ASSISTANCE, OR, ALTERNATIVELY, REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR FOR A SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

The verified Application for Writ of Assistance, or, Alternatively, for an Order Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing said Judgment coming on regularly to be heard pursuant to the Order to Show Cause issued by this Court on September 7, 1973, notice of said hearing and the continued hearing having been duly given to each of the defendants herein, and the same having been heard in open court on October 12, 1973, with the plaintiffs, JAMES STEWART CO., an Arizona corporation, and M. SETH

HORNE and MAURINE D. HORNE, his wife, being represented by their attorney, HUBERT E. KELLY; the defendant JOAN H. COCKE, a divorced woman, being represented by her attorney, LORETTA S. WHITNEY; the defendant TRANSAMERICA TITLE COMPANY, successor by change of name to TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, being represented by its attorney, POWELL B. GILLENWATER; and the defendant FRANCIS M. COCKE, a divorced man, neither appearing in person nor by counsel; and the Court having taken the same under advisement on October 12, 1973; and it appearing [106] to the Court that the allegations set forth in the said verified application are true and correct and that this Court has jurisdiction to grant the relief sought in the said verified application; and

IT FURTHER APPEARING upon representation by counsel for the defendant TRANSAMERICA TITLE CO. that said defendant is no longer willing to act as escrow agent of Escrow No. 02013111-7 and close said escrow in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, or in any manner act in connection with the said escrow or the closing thereof; and

IT FURTHER APPEARING to the Court that the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated its willingness to be appointed pursuant to order of this Court to act for and in the place and stead of the defendant TRANSAMERICA TITLE CO. for the purpose

of closing said Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, and such instructions as are issued by the Court pursuant to this proceeding; and

IT FURTHER APPEARING, after considering the said verified application, the exhibits filed and the oral arguments of counsel at the hearing in open court, that the relief sought in the said verified application should be granted;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs, JAMES STEWART CO., an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife, are entitled to have Escrow No. 02013111-7 closed in accordanc with the [107] contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, and that a writ of assistance, order requiring compliance with the judgment dated September 27, 1972, or supplemental bill enforcing said judgment be, and it is hereby, issued by this Court and directed to the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, appointing and commanding said Title Insurance Company of Minnesota to act in the place and stead of the defendant TRANSAMERICA TITLE CO. as the escrow agent for the purpose of proceeding with and closing Escrow No. 02013111-7, or such other number

which said escrow may hereafter be assigned by Title Insurance Company of Minnesota, in accordance with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, substituted as escrow agent with all of the rights, privileges and duties of the defendant TRANSAMERICA TITLE CO. for the purpose of proceeding with and closing Escrow No. 02013111-7, all as set forth in the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, appointed as an officer of this Court to do any and all acts deemed necessary and proper to effectuate the closing [108] of Escrow No. 02013111-7 in accordance with the terms of the aforsaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, including but not limited to any and all acts and things necessary for compliance with the terms of the aforesaid contract and escrow instructions No. 02013111-7, and specifically those provisions set

forth in Paragraphs 1 and 3 of the aforesaid contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of escrow instructions No. 02013111-7; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, as the officer of this Court pursuant to Rule 70 of the Arizona Rules of Civil Procedure, be, and it is hereby, authorized to execute all documents for and on behalf of and in the name of FRANCIS M. COCKE for the purpose of effectuating the closing of Escrow No. 02013111-7, including but not limited to the execution of a warranty deed or deeds to convey the property set forth in the judgment entered and filed by this Court on September 27, 1972, and such other documentation as is necessary to effectuate the closing of Escrow No. 02013111-7 and the transfer of legal title thereto to plaintiffs, or any of them, subject to compliance by the plaintiffs with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided by [109] said escrow instructions dated October 9, 1968, then said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, as the appointed officer of this Court pursuant to Rule 70

of the Arizona Rules of Civil Procedure to effectuate the closing of Escrow No. 02013111-7, be, and it is hereby, appointed to hold said note and mortgage and to collect and deposit the proceeds thereof, as the same may be paid to it under the terms thereof, in such savings accounts or time certificates of deposit in any national banking association or federal savings and loan association in Phoenix, Arizona, as it deems best and desirable; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the writ of assistance, order requiring compliance with the judgment dated September 27, 1972, or supplemental bill enforcing said judgment issued pursuant to this order be also directed to the Sheriff, County of Maricopa, State of Arizona, commanding such officer, upon compliance with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers; as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, to remove the defendant FRANCIS M. COCKE from such portion or portions of said property as described in the judgment entered and filed by this Court on September 27, 1972, as is necessary, upon the aforesaid compliance by the plaintiffs herein, and to deliver possession of said portion or portions of said property to the plaintiffs; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant TRANSAMERICA TITLE CO. be, and it is hereby, directed to deliver, transfer and set over all documents, moneys, deposits, deeds, forms of deed and such other instruments as are

contained in Escrow No. 02013111-7 to TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, for the purposes of effectuating this [110] order and the writ issued pursuant hereto; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to the law of this case, the defendant TRANSAMERICA TITLE CO. is authorized to pay to itself from all sums on hand in Escrow No. 02013111-7, to the extent of the interest of Francis M. Cocke therein, all unreimbursed attorney's fees, costs, escrow fees, trust fees, transfer fees and any and all other expenses incurred in connection with said escrow and the transfer of said escrow to said Title Insurance Company of Minnesota, pursuant to this order.

DONE IN OPEN COURT this 31st day of October 1973.

/s/ Irwin Cantor
JUDGE

APPROVED:

TRANSAMERICA TITLE CO.
By
/s/ Frances Bumsted
FRANCES BUMSTED

[111]

IN THE SUPERIOR COURT OF THE STATE OF ARIZ.
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, v. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 Filed: 10/31/73

WRIT OF ASSISTANCE
OR, ALTERNATIVELY,
ORDER, REQUIRING COMPLIANCE
WITH JUDGMENT DATED
SEPTEMBER 27, 1972,
OR SUPPLEMENTAL BILL
ENFORCING SAID JUDGMENT

To: TITLE INSURANCE COMPANY OF MINNESOTA,
a Minnesota corporation
3003 North Central Avenue
Phoenix, Arizona; and

SHERIFF, COUNTY OF MARICOPA, STATE OF ARIZONA

G R E E T I N G:

WHEREAS, by judgment of this Court entered and filed on September 27, 1972, a certified copy of which is attached hereto as Exhibit "A", it was, among other things, adjudged and decreed that the above-captioned plaintiffs were entitled to specific performance by the defendant FRANCIS M. COCKE of a certain contract and escrow instructions entered into on October 9, 1968, between the plaintiff JAMES STEWART CO. as buyer and FRANCIS M. COCKE and JOAN H. COCKE as sellers, and such other and further relief as set forth in said judgment dated September 27, 1972; and

WHEREAS, by order of this Court on October 31, 1973, a certified copy of which is attached hereto as Exhibit "B," it was ordered that a writ of assistance, order requiring compliance with judgment dated September 27, 1972, or supplemental bill [112] enforcing said judgment be issued to TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, to effectuate the closing of Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973; and tothe SHERIFF OF THE COUNTY OF MARICOPA, STATE OF ARIZONA, to put said plaintiffs in possession of the land and premises as described in the judgment entered and filed by this Court on September 27, 1972, and to maintain and defend their possession upon their compliance with the terms of the aforesaid contract and escrow instruc-

tions entered into on October 9, 1968, as modified by the judgment dated Sepetmber 27, 1972, and the order dated October 31, 1973;

NOW, THEREFORE, TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, is commanded that, immediately after receiving this writ, it obtain from TRANSAMERICA TITLE CO. possession of the files relating to Escrow No. 02013111-7, including all documents, deeds, deposits and instruments constituting a part of said escrow files, and proceed with the closing of Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973, without delay; and the SHERIFF OF THE COUNTY OF MARICOPA, STATE OF ARIZONA, is commanded that, upon compliance by the plaintiffs with the terms of the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973, [113] to go to and enter upon such portion or portions of the land and premises as described in the judgment entered and filed by this Court on September 27, 1972, and eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said purchaser (the plaintiffs), and that the said Sheriff deliver to said purchaser or their assigns the possession of the land and premises without delay and maintain, keep and defend their possession according to the

tenor and true intent of the judgment dated September 27, 1972, and order of this Court dated October 31, 1973.

WITNESS, the HONORABLE IRWIN CANTOR, Judge of the Superior Court, State of Arizona, in and for the County of Maricopa, and the seal of said Superior Court, this 31st day of October, 1973.

/s/ Irwin Cantor
J U D G E

Attested by:
Wilson D. Palmer

By:
Carlyn R. Brennan
Deputy Clerk

[645]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCIS M. COCKE,

Plaintiff,

vs.

IRWIN S. CANTOR, EINO M. JACOBSEN, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANS-AMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON,

Defendants.

No. Civ. 74-20 Phx. WPC

Filed: 3/4/74

MEMORANDUM AND ORDER

This is an action under the Civil Rights Act, 42 U.S.C. §§ 1981 et seq.(1970). Jurisdiction is predicated on 28 U.S.C. § 1343 (3,4) (1970). Various defendants and groups of defendants have filed motions to dismiss or for summary judgment.

The action arises out of a real estate transaction and subsequent state-court litigation. The defendants are practically every party, attorney and judge who had anything to do with the case. The following is a summary of the [646] complex proceedings and the claims of the prolix complaint.

Plaintiff and defendant Joan Cocke made a property settlement agreement in 1964, pursuant to which a trust was established with First National Bank. They were divorced in 1967. Certain property in this district held by them and the trustee in varying interests was agreed to be sold in 1968 to James Stewart Company (or its nominee the defendants Horne), and is identified in the record as Parcels 1 and 2. Apparently the sale was to except a certain easement known as the Jenkins Ditch, designated parcels 1A and 2A. Defendant Transamerica Title was the escrow agent. After a series of events, including a dispute between the Cockes over payment instructions and refusal of plaintiff to execute certain documents, the buyers brought suit for specific performance of the sale agreement. James Stewart Co. v. Cocke, Civil No. C-222472 (Maricopa Cty., Arizona Super. Ct., filed Apr. 22, 1969).

In the meantime, the underlying payment dispute between the Cockes was litigated in post-divorce proceedings. Cocke v. Cocke, Civil No. D-89,833 (Maricopa Cty. Ariz. Super. Ct. Dec. 31, 1968 & Mar. 15, 1969), aff'd, 13 Ariz. App. 57, 474 P. 2d 64 (1970). The court there held Mr. Cocke estopped to assert the irrevocability of the trust, and found that the sale property had been placed outside the trust.

In a series of judgments, the trial court dismissed Cocke's counter- and crossclaims against his wife and other parties in the specific performance action. James Stewart Co. v. Cocke, supra (Nov. 10, 1970), aff'd sub nom. Cocke v. Transamerica Title Ins. Co., 16 Ariz. App. 556, 494 P. 2d 756 (1972). Finally it entered judg-

ment against Cocke on the [647] complaint and ordered the sale consummated. James Stewart Co. v. Cocke, supra (Sep. 27, 1972), appeal dismissed, No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). A more detailed but concise statement of the procedural facts and substantive issues appears in the two reported court of appeals decisions. While he proceeds here pro se, plaintiff was represented by counsel in the state litigation.

First, there is no question of this court's subject-matter jurisdiction. The complaint purports to state a claim for denial of due process and equal protection rights by individuals and by conspiracy. The judges are sued in their individual, not official, capacities, and the claim is therefore against "persons" within the meaning of the Act.

Second, exhaustion of remedies is not required in these cases, assuming arguendo that there are facts in the record to support that defense. McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433 (1963).

Third, there is no indication that the court lacks jurisdiction over the person of any of the defendants. All the attacks on the jurisdiction of this court are therefore without merit.

If properly obtained in courts of competent jurisdiction, the state judgments underlying the claims in the present complaint are res judicata of the things there decided. That has nothing to do with the constitutional issues raised here, however, which were not litigated in state court. Indeed, this

court would not have jurisdiction of the underlying dispute by itself, for lack of diversity or federal question. The gravamen of the complaint is that the state judicial system was perverted by the defendants to result in the [648] judgments against plaintiff, in contravention of the fourteenth amendment. A finding of res judicata or collateral estoppel, in the context of this case, would bar redress on the very facts alleged to be the proximate cause of the constitutional harm.

Plaintiff's first attack is on the jurisdiction of the state courts to decide the real estate dispute. His premise for this contention is that the courts proceeded to judgment in the absence of "indispensable parties." It is well settled that the considerations in rule 19(b) are equitable, not jurisdictional. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733 (1968) (Footnote omitted); see Jacobs v. United States, 367 F. Supp. 1275, 1281-84 (D. Ariz. 1973).

Once this linchpin falls, plaintiff's complaint states no more that the history of a complex, sometimes confused litigation. Without reciting detail, but nevertheless reading the complaint with every intendment in its favor, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972), it fails to demonstrate that the defendants used

the courts unequally against him, or that the process was a sham, or that any significant right was denied him without legal justification. It is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. It wholly fails to show any conspiracy. The complaint does not state a claim [649] under the Civil Rights Act. Scott v. California Supreme Court, 426 F. 2d 300 (9th Cir. 1970); Fed. R. Civ. P. 12 (b) (6).

It is unnecessary to reach the issue whether plaintiff must demonstrate membership in a class under one or more sections of the statute.

IT IS ORDERED:

1. The motions to dismiss for lack of subject matter jurisdiction by defendants Cantor, Jacobson and Donofrio, defendants Tanner, Kelly, Schneider, Title Ins. Co. of Minn,. James Stewart Co., Horne et ux. and Burton, and defendant Joan Cocke are denied. Fed. R. Civ. P. 12(b) (1).

2. The motions for summary judgment on the ground of res judicata by all defendants except Cantor, Jacobson, and Donofrio are denied.

3. The motion of defendants Cantor, Jacobson and Donofrio to dismiss on the ground of judicial immunity is granted.

4. The motions of all defendants to dismiss pursuant to Fed. R. Civ. P. 8, 12(b) (6) are granted.

5. The complaint and action are dis-

missed with prejudice.

DATED March 4, 1974.

/s/ Wm. P. Copple
United States District
Judge

UNITED STATES DISTRICT COURT

for the

District of Arizona

CIVIL ACTION FILE NO. 74-20 Phx. WPC

FRANCIS M. COCKE,

Plaintiff,

vs.

IRWIN S. CANTOR, et al;

Defendants.

JUDGMENT

This action came on for ~~trial (hearing)~~ consideration before the Court, Honorable Wm. P. Copple, United States District Judge, presiding, and the issues having duly ~~tried (heard)~~ considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing and that action is dismissed with prejudice.

FILED

March 4, 1974

By /s/ P. T. Martin
Deputy Clerk

Dated at Phoenix, Arizona, this 4th day of March, 1974.

W. J. FURSTENAU, Clerk

By /s/ P. T. Martin
Deputy Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS M. COCKE, Plaintiff-Appellant	
v.	No. 74-1997
IRWIN S. CANTOR, et al. Defendant-Appellees	O R D E R
	Filed: 10/7/74

Before: MERRILL, HUFSTEDLER, and WALLACE, Circuit Judges. In the light of the entire record, the district court correctly determined that the complaint failed to assert a claim upon which relief could be granted.

The judgment of dismissal is affirmed.

KELLY AND CORBIN
550 West Washington
Phoenix, ARizona 85003

Attorneys for Plaintiffs,

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE his wife, Plaintiffs,	)	NO. C-222472
vs.	)	
FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants.	)	Filed: September 30, 1974
vs.	)	
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Additional Defendant on Counterclaim.	)	

ORDER APPROVING ACCOUNT OF COURT-APPOINTED OFFICER AND PETITION FOR APPROVAL AND APPLICATION FOR INSTRUCTIONS AND FOR DISTRIBUTION

(Assigned to Judge Cantor - Division 7)

TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, having filed its verified Account of Court-Appointed Officer; Petition for Approval and Application for Instructions and for Distribution; and pursuant thereto, the Court having issued its Order to show cause why the relief prayed for in the account and petition should not be granted and appointing the 28th day of August, 1974, at the hour of 4:00 o'clock P.M. as the place and time for hearing upon said petition;

And, on said day and time the said account and petition coming on regularly to be heard by the Court, the Petitioner TITLE INSURANCE COMPANY OF MINNESOTA and Plaintiffs appearing by their attorney, Hubert E. Kelly, the Defendant, FRANCIS M. COCKE, appearing by and through his attorney, L. Alton Riggs, Jr., and Defendant, JOAN H. COCKE, appearing by and through her attorney, Loretta Whitney, and no other party appearing in person or by their attorney, and the Court having heard the testimony and having examined the proofs offered in evidence finds that the allegations set forth in the Verified Account and Petition are true and correct and that the Court has jurisdiction to grant the relief sought in the said Verified Account and Petition;

And, the Defendant, JOAN H. COCKE, by and through her attorney, Loretta Whitney, having represented to the Court her approval of the Verified Petition and Account and for the relief therein sought;

And it appearing to the Court that TITLE INSURANCE COMPANY OF MINNESOTA, pursuant to the Writ of Assistance issued out of this Court on October 31, 1973, did proceed with the closing of the escrow theretofore known as No. 0201311-7 in accordance with the contract and escrow

instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyers, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, as modified by the Judgment dated September 27, 1972, and the Order granting the Writ of Assistance on October 31, 1973; that in connection with the closing of said escrow pursuant to the Contract and Escrow Instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyers, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, Plaintiffs have done all things thereunto required of them and did comply with the terms of said Contract and Escrow Instructions, as modified by the Judgment entered and filed by this Court on September 27, 1972 and the Order of October 31,1973 granting the Writ of Assistance; that in connection with the closing of said escrow, Title Insurance Company of Minnesota did all things thereunto commanded of it by this Court under the Writ of Assistance issued by this Court pursuant to the Order of October 31, 1973 and did close said escrow on December 20, 1973 in accordance with terms and conditions of the aforesaid Contract and Escrow Instructions, as modified, and did, on December 21, 1973, in connection therewith grant the easements provided for in said Contract and Escrow Instructions, copy of which are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by reference, and did convey to Plaintiffs according to their respective interests, pursuant to the Writ of Assistance and by Special Warranty Deed, a copy of which is attached hereto as Exhibit "C", the interest of the Defendant, FRANCIS M. COCKE, in and to the real property situate in Maricopa County and described therein; and that in connection with the closing of

said escrow the said TITLE INSURANCE COMPANY OF MINNESOTA, did further receive and account for the charges against and credits to the Plaintiffs as buyers, and the charges against and credits to the said FRANCIS M. COCKE and JOAN M. COCKE, as sellers, according to their respective interests and in accordance with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgment entered and filed herein on September 27, 1972 and the Order of October 31, 1973;

It further appearing to the Court that the aforesaid Contract and Escrow Instructions provided the Plaintiffs the right and privilege to prepay the purchase money mortgage given by them in connection with the closing of said escrow for and on behalf of the Defendants, FRANCIS M. COCKE and JOAN A. COCKE, at any time after January 2, 1969; that on July 1, 1974, Plaintiffs did prepay the full amount of the unpaid balance of the purchase money mortgage then due and owing, viz.: $420,238.15, plus interest in addition thereto of $13,253.51, against the interestof FRANCIS M. COCKE, the said TITLE INSURANCE COMPANY OF MINNESOTA offset $8,240.80, the shortage in closing fees and charges of the Defendant, FRANCIS M. COCKE on December 20, 1973; that as a result of said prepayment by Plaintiffs the said TITLE INSURANCE COMPANY OF MINNESOTA paid in full a mortgage due the Federal Land Bank Association in the sum of $34,802.88, on the real estate the subject of said Contract and Escrow Instructions entered into on October 9, 1968, for the purpose of clearing title for the subject property to Plaintiffs; that pursuant to the Contract and Escrow Instructions, as modified, there remains due and owing

to Arleigh H. Burton, as a result of the prepayment by Plaintiffs and for real estate commissions due pursuant to the aforesaid Contract and Escrow Instructions the sum of $17,411.91, plus interest, to July 1, 1974 of $560.06, which said TITLE INSURANCE COMPANY OF MINNESOTA applied against the interest of FRANCIS M. COCKE, the sum of $14,320.07, and against the interest of JOAN H. COCKE the sum $3,651.90, and that there now remains in the hands of the said TITLE INSURANCE COMPANY OF MINNESOTA for and on behalf of the Defendants, FRANCIS M. COCKE the sum $278,216.02 and JOAN H. COCKE, the sum $94,259.79, all pursuant to the aforesaid Contract and Escrow Instructions entered into on October 9, 1968 as modified by the Judgement entered and filed on September 27, 1972 and the Order dated October 31, 1973;

And the Defendant, FRANCIS M. COCKE, having filed in Open Court F. M. Cocke's Response to Order to Show Cause and Motion to Vacate or Set Aside Order Granting Writ of Assestance and the Writ Itself, and the Court having considered the same and all other matters and things in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED denying Defendant's FRANCIS M. COCKE'S Motion to Vacate or Set Aside Order Granting Writ of Assistance and the Writ Itself, and the Court reaffirms the Order entered on October 31, 1973 granting a Writ of Assistance, Order Requiring Compliance With Judgment Dated September 27, 1972, Or Supplemental Bill Enforcing Said Judgment And The Issuance of the Writ of Assistance on October 31, 1973; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the closing of Escrow No.

0201311-7 on December 20, 1973 by the TITLE INSURANCE COMPANY OF MINNESOTA pursuant to the Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgement entered and filed herein on September 27, 1972 and by Order of this Court on October 31, 1973, and pursuant to the Writ of Assistance issued by this Court on October 31, 1973 is approved and confirmed and that the account of the said TITLE INSURANCE COMPANY OF MINNESOTA as set forth in the Verified Petition and Account be, and it is hereby, settled and approved including, but not limited to the following:

a) The receipt of purchase money proceeds and mortgages and the application of charges and credits for and against the Plaintiffs, as buyers, and the Defendants, FRANCIS M. COCKE and JOAN H. COCKE, as sellers, according to their respective interests, in connection with the closing of the aforesaid escrow, including the disbursement of proceeds of sale in the sum of $21,210.84 to JOAN H. COCKE, on or about December 20, 1973;

b) The easements granted by the said TITLE INSURANCE COMPANY OF MINNESOTA in connection with the closing of said escrow as provided for in the Contract and Escrow Instructions entered into on October 9, 1968, copies of which are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by this reference;

c) The Special Warranty Deed executed by said Title Insurance Company of Minnesota, pursuant to the Writ of Assistance, a copy of which is attached hereto as Exhibit "C".

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving and settling the accept-

ance of the prepayment by Plaintiffs JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE of the full amount of the purchase money mortgage then due and owing on July 1, 1974 to Defendants, FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests, viz.: $420,238.15, plus interest of $13,253.51, and the issuance by Petitioner of satisfaction of mortgages by reason of said prepayment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving the deposit proceeds available for distribution and in the hands of Petitioner in certificates of deposits and savings accounts pending distribution of same;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that distribution be made by Petitioner of $278,216.02 to the Defendant, FRANCIS M. COCKE, and of $94,259.79 to the Defendant JOAN H. COCKE, as and for their respective remaining distributable share of the purchase money proceeds out of the Contract and Escrow Instructions dated October 9, 1968, as modified by the Judgment of this Court entered and filed on September 27, 1972 and the Order dated October 31, 1973;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving all other acts and things done by Petitioner, TITLE INSURANCE COMPANY OF MINNESOTA on behalf of FRANCIS M. COCKE and JOAN H. COCKE in connection with the Contract and Escrow Instructions dated October 8, 1968, as modified by the Judgement of this Court entered and filed on September 27, 1972 and the Order dated October 31, 1973 and the prepayment of the purchase money mortgages received from Plaintiffs in connection therewith on September 20, 1973.

DONE IN OPEN COURT THIS 30th day of

September, 1974.

/s/ Irwin Cantor
Judge of the Superior Court

The Original of the foregoing lodged with the Court this 13 day of September, 1974.

Copies mailed this 13 day of September, 1974, to:

Powell B. Gillenwater, Esq.
Browder & Gillenwater
3003 North Central Avenue, Suite 2304
Phoenix, Arizona 85012
Attorneys for Transamerica Title

Ms. Loretta Whitney
603 Luhrs Building
Phoenix, Arizona 85003
Attorney for Joan H. Cocke

George Sorenson, Jr., Esq.
609 Luhrs Building
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Attorney for Dorothy H. Cocke
and Elizabeth C. Cocke

L. Alton Riggs, Jr., Esq.
48 North MacDonald Street
Mesa, Arizona 85201
Attorney for Francis M. Cocke

Mr. Francis M. Cocke
In Proper
1320 South Priest Road
Tempe, Arizona

/s/ Hubert E. Kelly
Hubert E. Kelly

Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

RICHARD L. THOMPSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004
(602) 254-7331

Counsel for Petitioner

VOLUME III

Pages 173 - 280

JAMES STEWART CO., M. SETH HORNE AND MAURINE D. HORNE V. FRANCIS M. COCKE AND JOAN H. COCKE

COMPLAINT FOR SPECIFIC PERFORMANCE OF REAL ESTATE CONTRACT

Filed: April 22, 1969

COMES NOW the Plaintiffs and for their cause of action against Defendants allege as follows:

I

Heretofore and on the 9th day of October, 1968, JAMES STEWART COMPANY, or its nominee, as buyer, entered into a real estate contract and escrow instructions, Escrow No. 02013111 to Transamerica Title Insurance Company, to purchase from the Defendants, FRANCIS M. COCKE and JOAN H. COCKE, as sellers, approximately 124 acres of land, being that part of the Southeast Quarter of Section 20, Township 1 North, Range 4 East, G&SRB&M, lying North of the right-of-way of the Jenkins Ditch, except a parcel containing from three to five acres containing certain improvements of the seller FRANCIS M. COCKE, situated in the Northeast corner of the property, north of the George Ditch. Brown Engineering Company, Civil Engineers, at the request of FRANCIS M. COCKE, have provided Plaintiffs with a legal description of said real property (adding thereto as agreed upon by the parties, that portion of the right-of-way of the Jenkins Ditch to the water's edge), a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof. The Defendant FRANCIS M. COCKE and the Defendant JOAN H. COCKE were and are the

owners of Parcel No. 1 of said real property, as described in the said Brown Engineering description, and the Defendant FRANCIS M. COCKE was and is the owner of Parcel No. 2 of said real property. The Defendants are presently legally able to convey said property in accordance with said Agreement.

II

Under the terms of said Agreement and Escrow Instructions dated the 9th day of October, 1968; a copy of which Agreement is attached hereto, marked Exhibit "B", and by reference made a part hereof, Plaintiff or its nominee agreed to buy and pay for said real estate, as provided in said Agreement, and Defendants agreed to sell and convey the real property described in Exhibit "A", under the time sales provisions of said Agreement to be secured by a mortgage on said property. In compliance with instructions of Defendants, Plaintiffs executed notes and mortgages and deposited the same with Transamerica Title Insurance Company. Copies of said promissory notes and mortgages are attached hereto and collectively called Exhibit "C", and by reference made a part hereof.

III

That in conformity with said Agreement the Plaintiffs nominated M. SETH HORNE and MAURINE D. HORNE as the purchasers under said Agreement, and the Plaintiffs JAMES STEWART COMPANY, M. SETH HORNE and MAURINE D. HORNE either paid or deposited with Transamerica Title Insurance Company all sums required to be paid under said Agreement to this date.

Included therein was $40,000.00 paid directly to Defendants; $20,000.00 of which was paid outside of escrow and $20,000.00 released from escrow to Defendant FRANCIS M. COCKE. A copy of said nomination is attached hereto, marked Exhibit "D", and by reference made a part hereof.

IV

That Defendant JOAN H. COCKE has executed the Deed required to be executed by her, but the Defendant FRANCIS M. COCKE has refused to execute the Deed required to be executed by him. Copies of said Deeds are attached hereto, marked collectively Exhibit "E", and by reference made a part hereof.

V

As an accommodation to the Defendants, Plaintiffs agreed to accept and pay for more than the land described in the Agreement of Purchase, and in consideration for said Agreement, the Defendants agreed to execute and deliver to Plaintiffs a quit-claim deed to a narrow strip of land which includes the easement area of Jenkins Ditch and a power line easement. A copy of said Quit-Claim Deed is attached hereto, marked Exhibit "F", and by reference made a part hereof.

VI

The Agreement provides that Defendants execute partial releases of mortgage in approximately five-acre tracts, which said parcels are to be released to Plaintiffs in conformity with the Agreement of Purchase. The Defendant JOAN H. COCKE has

executed the releases of her interest in Parcel No. 1, but the Defendant FRANCIS M. COCKE has refused to execute said releases. Copies of said Partial Releases are attached hereto, marked collectively Exhibit "G", and by reference made a part hereof.

VII

That Plaintiffs are ready, willing and able to pay the purchase money for the said property to Defendants, and have performed every covenant, term and condition, required to be performed under the terms of the said Agreement, except the payment of future sums under the said contract, which said sums are not yet due and payable, and which said sums the Plaintiffs are ready, willing and able to pay when due.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

1. That the Defendant FRANCIS M. COCKE be required to execute and deliver to Transamerica Title Insurance Company, and the Defendant JOAN H. COCKE deliver to Transamerica Title Insurance Company, sufficient warranty deeds of said property, to M. SETH HORNE and MAURINE D. HORNE, as required by said Agreement, and that Defendants cause to be issued to M. SETH HORNE and MAURINE D. HORNE the title insurance policy required to be furnished thereunder, all in accordance with said Agreement and Escrow Instructions, and that Escrow No. 02013111 at Transamerica Title Insurance Company be ordered closed in accordance with said Agreement and Escrow Instructions.

2. That the Defendant FRANCIS M.

COCKE execute and deliver to Transamerica Title Insurance Company, and the Defendant JOAN H. COCKE deliver to Transamerica Title Insurance Company those certain Partial Releases of Mortgage agreed to be held by Transamerica Title Insurance Company and released to Plaintiffs upon payment of sums as provided in said Agreement.

3. That in the event the Defendants refuse to execute the Deeds, the Partial Releases of Mortgage, or any other items required by Defendants to be executed and delivered, that the Court establish by order and decree, the rights of Plaintiffs.

4. That the Court enter its order designating a depository to whom M. SETH HORNE and MAURINE D. HORNE shall pay the remaining sums to be paid under this agreement, and order Transamerica Title Insurance Company, upon the payment by Plaintiffs M. SETH HORNE and MAURINE D. HORNE of the sums provided to obtain releases of tracts under said Agreement, to release to Plaintiffs M. SETH HORNE and MAURINE D. HORNE tracts as described in said Agreement of Sale and Purchase.

5. That Defendants be required to execute such other papers required to be executed under the terms of said Agreement, or that the Court establish all such matters by order and decree.

6. For reasonable damages for the failure of Defendants to close said Escrow as agreed and to convey said real property to M. SETH HORNE and MAURINE D. HORNE.

7. For such other and further relief as to the Court seems just and proper.

DATED at Phoenix, Arizona, this 22nd day of April, 1969.

TANNER, JARVIS, OWENS & HOYT

By /s/ Wallace O. Tanner
Wallace O. Tanner
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation, M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, v. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	NO. C-222472 DEFENDANT F. M. COCKE'S ANSWER AND COUNTERCLAIM AGAINST PLAINTIFF AND TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA AND CROSS-CLAIM AGAINST DEFENDANT JOAN H. COCKE Filed: June 23, 1969

COMES NOW defendant FRANCIS M. COCKE and for his answer and counterclaim against the plaintiffs and against the additional counterdefendant Transamerica Title Insurance Company of Arizona, and cross complaint against defendant JOAN H. COCKE, admits, denies and alleges as follows:

Defendant, counterclaimant against plaintiffs and Transamerica Title Insurance Company of Arizona, and cross-claimant FRANCIS M. COCKE is sometimes referred to herein as defendant, F. M. Cocke, or Seller; plaintiffs-counterdefendants sometimes as

Buyer or Buyers; counterdefendant TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA as Transamerica or escrow agent; and defendant and cross-defendant JOAN H. COCKE as J. H. Cocke, life tenant or Seller. The cross complaint and the counterclaims against plaintiffs and Transamerica are contained in the answer. Defendant's exhibits are made parts of the answer by this reference.

I

Answering Paragraph I of the complaint, admits that on October 9, 1968, an executory real estate contract was entered into by JAMES STEWART COMPANY by Wallace O. Tanner, Vice-President, as Buyer, and FRANCIS M. COCKE and JOAN H. COCKE, as Seller, for sale and purchase of about 124 acres of land in the SE¼ of Sec. 20, 1N 4E, and alleges that on the same day the same parties, and ARLEIGH R. BURTON, Broker, signed an escrow agreement with Transamerica Title Insurance Company, being Escrow Instructions No. 02013111-7, controlling, as later modified by action of parties and along with instructions received from First National Bank of Arizona, Trustee, the deposit, custody, delivery and redelivery of documents and money, which agreement and instructions are attached to the complaint in Exhibits B and C. Alleges that the instructions provided for possession at close of escrow, that the escrow has not closed so as to provide for possession, and that Buyer has not entered into possession nor use of any of the subject land. Admits that Brown Engineering Company, Civil Engineers, at the request of Francis M. Cocke, provided by letter of Dec. 18, 1968 descriptions of Parcels No. 1 and No. 2 and Parcels No. 1A and 2A, which descriptions

are attached to the complaint in plaintiffs' Exhibit A, and admits that as agreed upon by the parties the land north of the north water edge of Jenkins Ditch was included in the descriptions of the land proposed to be sold and paid for.

Further answering Paragraph I admits that F. M. COCKE was and is the owner of Parcel 2 as described in the Brown Engineering description Exhibit A of the complaint, but denies that JOAN H. COCKE was or is the owner of more than a lifetime beneficial interest in any part of Parcel 1 as so described, and affirmatively alleges that her interest was and is only that of life tenant of, entitling her only to the income from, an undivided one-half interest in such Parcel No. 1 or from proceeds of sale thereof, and further alleges that FRANCIS M. COCKE was and is the owner of an undivided one-half interest in such Parcel 1 and that the other undivided one-half interest was and is subject to an irrevocable trust for the benefit of JOAN H. COCKE, life tenant, and BARBARA COCKE VALDEZ, DOROTHY COCKE and ELIZABETH COCKE, a minor (children of Francis M. Cocke and Joan H. Cocke), remaindermen, as provided by the Property Division Agreement of Jan. 24, 1964 between Francis M. Cocke and Joan H. Cocke, implemented by the Trust Agreement of Aug. 7, 1964 between J. H. Cocke and First National Bank of Arizona as trustee, and modified and affirmed as modified by the Supplemental Agreement of Oct. 18, 1965 between J. H. Cocke and F. M. Cocke. Alleges that all three of these agreements were held to be valid and in full force and effect by judgment of the Maricopa County Superior Court of March 17, 1967, from which no appeal was taken, in Cause No. D-89833, Second and Third Claims

for Relief, by JOAN H. COCKE, plaintiff, versus FRANCIS M. COCKE, FIRST NATIONAL BANK OF ARIZONA, BARBARA COCKE VALDEZ, DOROTHY COCKE, a minor, and ELIZABETH COCKE, a minor. Copies of these three agreements are attached hereto as defendant's Exhibit D-A, D-B, and D-C respectively, and are discussed briefly below in this Paragraph I. Denies that F. M. COCKE and JOAN H. COCKE are, or were, legally able to convey the trust one-half interest in Parcel No. 1 except as an equitable conversion of trust land into other trust property, and denies that the agreements between Sellers and Buyers provided for payment to JOAN H. COCKE, alone, of any of the principal proceeds of sale of the trust property.

Further answering Paragraph I affirmatively alleges that Mr. Burton, the broker, and Mr. Tanner, for the Buyer, were both notified by this defendant of the irrevocable trust status of the trust undivided one-half interest in Parcel No. 1 well before any papers were signed, and that both were well aware by reason of such notice that when Joan H. Cocke signed the agreements on Oct. 9, 1968 she agreed, subject to all the terms and conditions of the instruments, to sell no more than the interest she then had and now has, which was and is only the interest of life tenant entitling her to the income for life from the trust one-half interest in Parcel No. 1 or from proceeds of a sale thereof.

Defendant further alleges that at the office of Transamerica immediately following the signing of the sale and purchase agreement by Mr. Tanner and this defendant, and the signing of the escrow instructions by Mr. Tanner, this defendant and Mr. Burton, it was agreed between them that

the next step was to secure the signature of Joan H. Cocke to such instruments and to secure a deed from First National Bank of Arizona, trustee, of trustee's legal title to such one-half interest in Parcel 1. Alleges that Joan H. Cocke signed the sale and purchase and escrow agreements the evening of Oct. 9, 1968.

Defendant further alleges that: On Oct. 10, 1968, a letter of instructions to the trustee Bank was composed by LORETTA S. WHITNEY, Joan H. Cocke's attorney, and F. M. COCKE, at said attorney's office, to be signed by defendants F. M. COCKE and J. H. COCKE, instructing said trustee to execute a deed direct to JAMES STEWART COMPANY (not to J. H. Cocke) to be placed in the escrow with instructions to the escrow agent that the sale was to be consummated in accordance with further instructions to be furnished escrow agent by J. H. Cocke and F. M. Cocke (not by J. H. Cocke alone) governing the distribution of the proceeds of the sale of the trust property. A copy of such defendants' letter to trustee Bank signed by both defendants, and a copy of the Bank's letter to Transamerica accompanying the deed are included by plaintiff Buyers in their Exhibit C, along with a copy of instructions to the escrow agent drafted and signed and placed in escrow by F. M. Cocke on Jan. 21, 1969, but not signed by Joan H. Cocke who apparently on advice of her attorney has refused to sign any such instructions unless they provided for payment to her, free of trust, of the proceeds of sale of the trust property. These instructions submitted by F. M. Cocke after recital of circumstances provided for a higher than average sale price for Parcel No. 1, a lower than average sale price for an equal acreage of F. M. Cocke's land in

Parcel No. 2, computation of commission on the average price, and that the proceeds of sale of the trust property would be paid to Joan H. Cocke AND Francis M. Cocke. This last provision is in accordance, as to effect, with the condition contained in the Bank's letter accompanying its special trustee deed to Buyer, that disposition of the proceeds of the sale of the trust property would be governed by instructions from both J. H. Cocke and F. M. Cocke (not J. H. Cocke alone), and Buyers' earnest money was paid to both Sellers.

Defendant further alleges that: Also included in plaintiff Buyers' Exhibit C are copies of Buyers' promissory note and mortgage, both prepared by Buyer as representing the deferred balance on the trust property after credit of the down payment to have been paid in Dec. 1968 and the release payment to have been paid in January 1969. In addition, Buyer has placed in escrow a personal check drawn on a Virginia bank dated March 7, 1969, payable to "First National Bank of Arizona -- Account of Joan H. Cocke" in the amount of $32,000.00 as payment of release money for releases from the trust one-half interest in Parcel No. 1 to have been paid in January 1969, as mentioned above. Plaintiffs have not furnished a copy of this check with the complaint, and a copy is therefore attached to this answer as defendant's Exhibit D-E. Such promissory note, mortgage and check are all made out in favor of Joan H. Cocke, alone, contrary to the instruction accompanying the deed of trustee's legal title that the proceeds of sale of the trust one-half interest in Parcel No. 1 were to be governed by instructions from J. H. Cocke and F. M. Cocke, as mentioned above. The effect of these instruments is discussed

further in Paragraph II, (2) below.

Defendant further alleges that: In error, the trustee made out its special warranty deed to JAMES STEWART COMPANY to include a trustee's interest in all of Parcel No. 1 instead of only trustee's interest in the trust undivided one-half share therein. Upon verbal objection by this defendant to the description of all of Parcel No. 1, rather than a one-half interest therein, in the Bank's special warranty deed, both the escrow agent and trustee Bank assured him that since the trustee could not effectively deed out any interest it did not have, the error was harmless. A copy of such special warranty deed was not furnished by plaintiff Buyers in their complaint, and a copy is therefore attached to this answer as Exhibit D-D. This special warranty deed sets forth that it is executed by First National Bank of Arizona "as trustee under the terms and conditions of that instrument entitled Trust Agreement, made and entered into on August 7, 1964, between Joan H. Cocke, as Trustor, and said First National Bank of Arizona". Significantly, the Trust Agreement (Exhibit D-B) recites that Trustor desires to establish a trust in accordance with the intent of the Property Division Agreement of Jan. 24, 1964. The Property Division Agreement (Exhibit D-A) provides in Paragraph 3 thereof for an irrevocable trust for the benefit of J. H. Cocke as life tenant and the three children, above named, as remaindermen. Any questions arising as to the extent to which the Trust Agreement of Aug. 1964, to which F. M. Cocke was not a party, modified the trust provisions of the earlier Property Division Agreement of Jan. 1964, were resolved by the later Supplemental Agreement

of Oct. 1965, between J. H. Cocke and F. M. Cocke (Exhibit D-C) ratifying and affirming the provisions of the Property Division Agreement except as specifically modified by such Supplemental Agreement.

Further answering Paragraph I, defendant alleges that when he and J. H. Cocke exercised the authority granted them by the Trust Agreement to withdraw the trust one-half interest in Parcel 1 from the control of the trustee Bank, they assumed the responsibilities of resulting or constructive trustees, and alleges that he would be liable to the remaindermen for any loss resulting to their interests in the trust corpus by payment, as now proposed by Buyers and J. H. Cocke, of trust principal funds to the life tenant in the amount of about $123,000.00.

Further answering the last sentence of Paragraph I, denies that defendants J. H. COCKE and F. M. COCKE are legally able to convey Parcel 1A and Parcel 2A described in the Brown Engineering Company description attached by plaintiff Buyers to their complaint as Exhibit A, and denies that said Agreement, or the real estate contract mentioned in Lines 16 and 17 of Page 1 of the complaint, or any other agreement provides for the conveyance by defendants of Parcel 1A or Parcel 2A. This point is discussed further in Paragraph II (3) below.

II

Answering those portions of the first sentence of Paragraph II of the complaint not already answered by Paragraph I above, defendant denies that Buyers agreed to buy or to pay for Parcels No. 1A and No. 2A described in the Brown Engineering Co.

description marked plaintiffs' Exhibit A, and denies that defendants agreed to sell and convey Parcels No. 1A and No. 2A, either in any of the various provisions of the Agreement and Escrow Instructions directly affecting only sellers and buyers, and the broker, or in any of the provisions of the Agreement and Escrow Instructions binding also on Transamerica, contracting as escrow agent and title insurer, concerning mainly the mechanics of the transaction including deposit of documents and money and custody, delivery or redelivery thereof, dates for compliance, and cancellation provisions, plus marketability of titles.

Alleges that as surveyed Parcel 1A contains .8720 acres, and Parcel 2A contains .3923 acres, and together they constitute a long, narrow strip of land all along the south side of the land proposed to be sold, which strip is bounded on the north by the north water edge of Jenkins Ditch and on the south by an old fence line and a line of power poles. Alleges that defendants have never claimed title to this strip, which is occupied by the Jenkins Ditch and the power poles, although most of it lies north of the fense continuously maintained by them, beginning about 25 years ago, up until the time the pasturing of cattle in the area was no longer practised. Alleges that at one time defendant offered to quit-claim his possessory interest in the strip to Mr. Horne, for nothing, or to file and wait out a quiet title suit and if successful to sell his interest separately to Buyer at the stated price per acre, but Mr. Horne stated that if he became the owner he would probably have to pay for a pipeline replacing the open Jenkins Ditch, and did not want the strip at any price. Alleges that for this reason this defendant did not

pursue the matter with J. H. Cocke, who would have to join in any deeds and in any quiet title suit, which suit would also require the cooperation of trustee Bank, not always readily forthcoming. In the event that it should prove useful, defendant has attached hereto as Exhibit D-F a copy of the 1892 grant of easement for Jenkins Ditch by defendants' predecessor in interest, which grant specifies a 24 foot right of way some 2 rods south of the present location of the ditch. Alleges this places the north right of way line of Jenkins Ditch no farther north than the north water edge.

Further answering Paragraph II, defendant admits that Buyers executed notes and mortgages with attached descriptions of the property to be mortgaged representing the deferred balances due on the proposed sale and deposited same with Transamerica and attached copies of same to the complaint in Buyers' Exhibit C, but denies that such notes, mortgages and descriptions were all in compliance with the agreements and instructions by the parties and in this connection alleges that:

(1)

The description of Parcel 2 attached to the Parcel 2 mortgage included in Buyers' Exhibit C excludes a small triangle of land, worth about $6.00, which was properly included in the description of Parcel 2 by Brown Engineering attached to the complaint as Buyers' Exhibit A. The inclusion of this de minimis parcel in F. M. Cocke's Parcel 2 warranty deed to Buyer, according to a statement made to this defendant on March 20, 1969, but never before, by Transamerica's escrow officer Mr. Henry Kavanaugh, is what

was relied on as the basis of Transamerica's claim that title to Parcel 2 as so described to include such $6.00 triangle is not insurable or marketable, and also as the basis of the escrow officer's statement to F. M. Cocke on March 21, 1969, that he (F. M. Cocke) has therefore never fully complied with the agreements and instructions, and therefore as the basis of the escrow officer's further statement to F. M. Cocke on March 21, 1969 and again on April 3, 1969, that since he (F. M. Cocke) had never fully complied, his 13-day notice of cancellation of the instructions because of Buyers' noncompliance, filed with such escrow officer on March 5, 1969, was ineffective. On March 21, 1969 the escrow officer refused F. M. Cocke's verbal demand, and on April 3, 1969 refused F. M. Cocke's written demand, for the documents signed by him the return of which is provided for by the escrow instructions. The escrow officer, Mr. Kavanaugh, under close questioning in his office on March 20, 1969 by F. M. Cocke, before a witness, as to any deficiencies in the deed to Parcel 2 (on deposit with the escrow agent since about January 24, 1969), failed to point to any deficiency other than the $6.00 triangle, to which, according to Transamerica's title plant, F. M. Cocke did not have title. However, in Paragraph I of Buyers' complaint, Buyers assert that F. M. Cocke did and does have title to such $6.00 triangle by their allegation that F. M. Cocke was and is the owner of, and presently able to convey, Parcel 2 as described in the Brown Engineering description attached to the complaint and marked Exhibit A, which description includes the $6.00 triangle. Buyers are therefore estopped, in attempting to prove their false allegation in Paragraph IV of the complaint, that defendant F. M. Cocke

has refused to execute the deed required to be executed by him, from claiming that his deed already on deposit was or is deficient because of its inclusion of the $6.00 triangle. Alleges that during the questioning by F. M. Cocke of the escrow officer on March 20, 1969, he stated that F. M. Cocke's deed to his one-half interest in Parcel I was satisfactory.

Defendant further alleges that:

There is another, and more substantive, reason why Buyers' and Transamerica's claim, that the inclusion of the $6.00 triangle in F. M. Cocke's deed to Parcel 2 rendered title to the described land uninsurable and unmarketable, is not available to either of them. All of such triangle lies north of the north water edge of Jenkins Ditch, and Buyers in Paragraph I of their complaint allege that as agreed upon by the parties the north water edge of the Ditch is the south line of the land that was to be sold. It is true that the triangle lies within the right of way staked out by the State of Arizona for a short access road connecting to 52nd Street, but the triangle, with its 14.29 ft. base on the line of the north water edge, extends only 9 ft. farther north to its northwest corner. At the time of Brown Engineering's survey, the State, after three years in court, had made no attempt to take from this defendant, and pay for, the title to any land at this location closer to the water's edge than 24½ ft. The State is now attempting to amend its complaint to include additional land at this location, but so far seeks to take from this defendant only the land north of a line parallel to and 9 ft. north of the north water edge, which leaves the triangle in the clear. The State's

physical occupation of the land included in the roadway, which will proably become a city street, will establish only an easement for road purposes, leaving the underlying fee title undisturbed; if the State or City takes title to the $6.00 triangle, payment therefor could be made to any buyers. Brown Engineering describes Parcels 1 and 2, which include half of 52nd Street and about a third of Priest Road, as subject to rights of way and easements for roads, ditches and public utilities.

Years ago the Starley family owned the land south of the Jenkins Ditch, and over the years such land was divided into small parcels and sold off with mismatched descriptions. When the State acquired portions or all of some of these small parcels for its roadways, it secured a quit-claim deed from Mrs. Ada Starley to assure it of clear title to any possible remnants resulting from the earlier mismatched descriptions, and the area within the roadway and north of Jenkins Ditch was included in her quit-claim. Buyers and Transamerica, as a basis for their claims of refusal to sign, unmarketability, and non-compliance, are apparently insisting that F. M. Cocke was divested of title to the triangle by Mrs. Starley's quit-claim to the State, although they have not seen fit to specify just when or by what instrument the Starleys took such title from F. M. Cocke. If the Starley quit-claim granted to the State all the land it included north of the Jenkins Ditch, it is strange that the State has already gone to the trouble and expense of condemning and paying about $4,000.00 to this defendant on about a one-acre parcel occupied by it east of 52nd Street and north of Jenkins Ditch, since the land

covered by the Starley quit-claim, dated Oct. 4, 1965, included all the land east of 52nd Street sought to be taken by the State by its complaint in condemnation against this defendant filed Dec. 29, 1965.

A third and still more earthy reason why no objection should have been made to the inclusion of the $6.00 triangle is that it will be needed by any buyer as a place to pile brush. The triangle is within the staked out access road but lies east of the paving at the point where the State has restricted the large Jenkins Ditch canal to a 36 inch pipeline. Extra heavy rainfall in this area is usually preceded by high winds, and, as has already happened once, the Ditch will plug itself off with tumbleweeds at the intake to the little pipeline, resulting in the flooding of the land to the north unless the brush is removed as carried to the intake by the inevitable heavy flow of storm-drain water. The Tempe city trash crews are instructed not to trespass on private property to pick up brush. On the other hand, the official Tempe Nuisance Inspector would probably cite any landowner who piles brush in a roadway in the truck-load amounts which will be carried to the intake. Common sense would dictate to almost any Tempe landowner in similar circumstances the enlargement, rather than the removal, of the $6.00 triangle.

A copy of the map prepared by Brown Engineering Co. in connection with its surveys, showing the $6.00 triangle and the land now sought to be condemned by the State, and a copy of Mrs. Ada Starley's quit-claim deed to the State, referred to as Docket 5843, page 155, in Buyers' and Transamerica's description of Parcel 2

without the $6.00 triangle, attached to the mortgage for Parcel 2 and included in plaintiff Buyers' Exhibit C, are attached to this answer as Exhibits D-G and D-H, respectively.

(2)

Referring again to Buyers' allegation in Paragraph II of the complaint that Buyers' notes and mortgages were deposited with the escrow agent in compliance with the agreements and instructions of the parties, this defendant denies such allegation and alleges that the note and mortgage representing the deferred balance due on the trust one-half interest but made out in favor of life tenant J. H. Cocke, are, regardless of any secret agreement between Buyers and life tenant or her attorney, contrary to the letter of Oct. 10, 1968 from J. H. Cocke and F. M. Cocke to trustee Bank, contrary to the instructions accompanying the Bank's special trustee warranty deed, contrary to the schedule of distribution of funds, mortgages, releases and commission prepared by the broker, Mr. Arleigh Burton, who is also an instructor of accounting at A.S.U. (copies of such letter, instructions and schedule are included by Buyers in their own Exhibit C', and also contrary to the provisions of the Property Division Agreement (Exhibit D-A) providing for the irrevocable trust (as more fully discussed above in Paragraph I), and therefore contrary to law, particularly ARS Sections 33-221 - 240, and especially Sec. 33 - 225. Defendant alleges that the preparation and deposit by Buyers with the escrow agent of such note and mortgage representing the deferred balance due on the trust property, but made out in favor of the life tenant of the trust,

Joan H. Cocke, and the preparation and deposit by Buyers with escrow agent of the $32,000.00 check representing the release price for releases from the trust one-half interest in Parcel No. 1, but made payable to the account of the life tenant of the trust, Joan H. Cocke, constituted counter proposals to and repudiations of the real estate contract entered into by the parties, and that by such preparations and deposits of such note, mortgage and check Buyers terminated such real estate contract and abandoned all their rights thereunder, and alleges that the deposits into escrow of such check and of the release check of same amount to F. M. Cocke for releases from his one-half interest in Parcel 1 were made after Mar. 5, 1969.

Defendant alleges that transfer of legal title to the trust one-half interest in Parcel 1 by trustee Bank, with the approval of life tenant Joan H. Cocke, is not sufficient to divest the equitable interest of the remaindermen, and alleges that the remaindermen are legally empowered to follow either the land or the proceeds thereof to recover their losses in the event such proceeds be paid to the life tenant as proposed and attempted by Buyers and Joan H. Cocke, life tenant; and further alleges that the title to the trust one-half interest in Parcel 1 so proposed and attempted to be acquired by Buyers, by such payment of the proceeds to life tenant, is neither marketable nor insurable.

(3)

Referring again to Buyers' allegation in Paragraph II of the complaint that Buyers agreed to buy and pay for, and that defendants agreed to sell and convey,

Parcels 1 and 2 (which defendant admits), and also Parcels 1A and 2A (which defendant denies), as described in Buyers' Exhibit A, to be secured by a mortgage on said property, and referring also to Buyers' further allegation in the same paragraph that Buyers executed notes and mortgages in compliance with instructions of defendants, and deposited same with Transamerica, copies of which are included in Buyers' Exhibit C, and which represented the balances allegedly due on all four of such parcels allegedly to be bought and paid for, and sold and conveyed, and secured by mortgage, defendant alleges that no reference whatsoever is made to Parcels 1A or 2A in the mortgages, or in the property descriptions attached thereto, deposited with the escrow agent, nor has any deferred balance due on Parcels 1A or 2A been evidenced by a separate note and mortgage, nor has any increase been made in the face amount of any of the three notes and mortgages deposited with the escrow agent (shown in Buyers' Exhibit C) representing the deferred balances on Parcels 1 and 2 as determined by Mr. Burton in the schedule of funds and mortgages also shown by Buyers in their Exhibit C.

III

Answering Paragraph III of the complaint, defendant admits that M. Seth Horne and Maurine D. Horne are the nominated purchasers, but denies that any of the Buyers either paid or deposited with the escrow agent all sums of money, or instruments representing same, required to be paid under agreement of the parties to Mar. 18, 1969 or to Mar. 20, 1969. Admits that $20,000.00 was paid on or about Oct. 9, 1968 as earnest money by check of James

Stewart Co. payable direct to Joan H. Cocke and Francis M. Cocke, and admits that $20,000.00 was released on or about Jan. 10, 1969 from escrow to Francis M. Cocke by Transamerica's check, but denies that the second $20,000.00 was "paid" to F. M. Cocke and alleges that:

About Sept. 1, 1968 F. M. Cocke signed a preliminary contract, without date, for sale of about the same land as attempted to be sold here, with Tom Fannin & Associates. The proposed sale was to have been handled as a subdivision trust, but the deal fell through because F. M. Cocke insisted on maintaining, as agreed upon in the writing, his seller's first lien position, and Stewart Title and Trust of Phoenix, on whose blank escrow instruction form the proposed contract had been typed by Fannin, refused to accept the trust unless the seller gave Stewart Title first, second and third lien positions, with seller holding only fourth priority on the proceeds of sale of his own land. Inquiry was made at Transamerica, but it too was interested in handling the deal only if seller would take fourth priority position. Lengthy negotiations toward pushing the deal through were had between F. M. Cocke and Mr. Jarrett Jarvis, attorney for Fannin and also law partner of Mr. Wallace O. Tanner, who therefore is presumed to have had knowledge of Tom Fannin and Associates' activities before, on, and after Oct. 9, 1968 equal to the knowledge of Mr. Jarvis. On Oct. 9, 1968, the same day the agreements here in litigation were being signed, Tom Fannin caused the Stewart Title escrow form, which had never been delivered to nor accepted by Stewart Title, to be recorded by Mr. Jarvis, apparently in an attempt to cloud the title and coerce F. M. Cocke

into paying a real estate commission to Tom Fannin and Associates which had acted as both broker and buyer. Since the blanks on the escrow form were without date, escrow number, name of any escrow officer and the signature of Joan H. Cocke, and the signature of F. M. Cocke was not acknowledged, and the signature of Tom Fannin was acknowledged, and the signature of Tom Fannin was acknowledged as of Oct. 10, 1968, the recorder's office indexed and filed the document under Miscellaneous, not under Agreements. However, Transamerica Title sided with Tom Fannin and Associates, and announced that the cloud on the title had successfully been placed and that it would refuse to insure title for the James Stewart Company deal until the cloud was removed, which is a slow process if done by quiet title suit, which is a fact well known to Mr. Tanner. After numerous confrontations between F. M. Cocke and Tom Fannin and his lawyers, other than Mr. Jarvis, and after several conferences between Mr. Horne and Tom Fannin, it was agreed that Mr. Horne would relinquish his first right of refusal to purchase a separate 11.2-acre parcel of Cocke land, that F. M. Cocke would list for sale his interest in such parcel with Fannin, and Fannin would withdraw its claim, which it did on Jan. 9, 1969. F. M. Cocke then advised Mr. Tanner at the office of the escrow agent on Jan. 9 or 10, 1969, that he had entered into the contract with James Stewart Co. for the purpose of raising cash, and owed mortgage payments, notes and debts for machinery due Jan. 1, 1969 of more than $60,000.00, and would be forced to file a 13-day cancellation notice in order to hurry up the Buyers' preparation of their long-delayed release schedule so that the escrow could close. Mr. Tanner proposed

that F. M. Cocke could draw $20,000.00 from escrow, but would have to sign a note and mortgage for $40,000.00.

F. M. Cocke agreed and Mr. Kavanaugh, escrow officer, acting on the instructions of Mr. Tanner for the Buyer, then gave F. M. Cocke a Transamerica check for $20,000.00, drawn against the $44,000.00 placed in escrow as part of the down payment by James Stewart Co., in exchange for F. M. Cocke's note for $40,000.00 payable to James Stewart Co. and secured by a mortgage on Parcel 2. F. M. Cocke did not ask for copies of the $40,000.00 note and mortgage since he expected them to be held in escrow for the protection of the escrow agent itself, the broker and the trust interests in the event of his death or some emergency, but such note and mortgage were pocketed by Mr. Tanner and carried from the building, over the objection of F. M. Cocke that that would amount to taking back the earnest money. The escrow officer made no objection; Mr. Burton was present.

Defendant further alleges that: Under questioning by F. M. Cocke, Mr. Kavanaugh stated on Mar. 5, 1969, and on Mar. 20 and Mar. 21, 1969 before a witness, that the $40,000.00 note and mortgage had not yet been redeposited in escrow, nor had any substitute funds been deposited to replace the extra $20,000.00. Inasmuch as the note is negotiable, Buyer took back and held until at least Mar. 21, 1969 F. M. Cocke's share of the earnest money, about $15,500, and if the note is held by a holder in due course without notice F. M. Cocke is out about $4500 in addition.

Defendant further alleges that:

On Mar. 5, 1969 he went to the escrow agent's office to inquire about Buyers' late releases, and was informed by Mr. Kavanaugh that the releases had been deposited the day before. At F. M. Cocke's request, Mr. Kavanaugh handed him for his signature a stack of 25 releases, averaging about 5 acres each. F. M. Cocke signed 10 releases for land in Parcel 1, and 15 for land in Parcel 2, without close examination on request for copies since he was relying on the escrow officer. Mr. Kavanaugh acknowledged his signature on the first one and said he would acknowledge the rest when he had more time. When F. M. Cocke finished signing the releases, Mr. Kavanaugh handed him for his signature a warranty deed made out to M. Seth Horne and Maurine D. Horne describing as the property to be conveyed Parcel 2 (without the de minimis triangle), Parcel 2A, and an undivided one-half interest in Parcel No. 1 and in Parcel 1A. F. M. Cocke then asked where that deed came from, and Mr. Kavanaugh replied that it had been submitted by Mr. Horne for his (F. M. Cocke's) signature. F. M. Cocke returned the deed, unsigned, to the escrow officer and asked for two copies of it, which the escrow officer than made and gave to him; a copy of a copy is attached as defendant's Exhibit D-J.

Defendant alleges that the preparation and deposit by Buyers with escrow agent of such warranty deed for the signature of F. M. Cocke constituted a counter proposal by the making of a new demand for extra land (Parcel 2A and the half-interest in Parcel 1A) and a repudiation of the real estate contract entered into by the parties, and that by such preparation and deposit Buyers terminated such real estate contract and abandoned all their rights thereunder.

Defendant further alleges that:

F. M. Cocke then requested a 13-day notice of cancellation of escrow instructions form, which the escrow officer partially filled out and gave him, and which he signed and returned to the escrow officer. As provided in the notice itself and in the fine print portion of the printed escrow instructions, this 13-day notice constituted notice to Buyers that unless Buyer complied with all the terms of the escrow instructions by Mar. 18, 1969, the escrow instructions would thereupon become cancelled. By letter of Mar. 6, 1969, escrow agent notified Buyer as provided by the fine print instructions that Buyer would have to comply with all the terms of the escrow on or before Mar. 19, 1969, otherwise Transamerica would have to comply with the notice and the demands therein made. Copies of F. M. Cocke's cancellation notice and of escrow agent's letter of notification thereof to Buyer are attached hereto as defendant's Exhibit D-K, and an enlarged copy of the fine print portion of the printed escrow instructions is attached as Exhibit D-L.

Defendant alleges (as alleged above at Page 19, line 28½) that on March 20 and again on March 21, 1969, the escrow officer, Mr. Kavanaugh, in his office stated to F. M. Cocke before a witness that the $40,000.00 note and mortgage carried from the escrow office on Jan. 9 or 10, 1969 by Mr. Tanner had not been returned, and that no substitute funds had been deposited, and defendant alleges that the agreements were cancelled at the close of business Mar. 18 or 19, 1969 (if not before) in accordance with the provisions of the printed escrow instructions, by Buyers' failure to rede-

posit the $40,000.00 note and mortgage or deposit substitute funds in cash, certified or cashier's check, or money order, in the amount of $20,000.00, and also by their failure to correct the proposed payment of trust proceeds to life tanant before the close of the 13-day period. Alleges that as provided by the cancellation notice personal checks are not to be accepted under a cancellation notice unless approved by the party seeking cancellation, and alleges that F. M. Cocke did not approve any personal checks.

Defendant further alleges that:

On Mar. 11 or 12, 1969, F. M. Cocke received a letter dated Mar. 10, 1969 from the escrow officer stating that escrow agent had received the various checks and documents mentioned in a letter to him from Buyers, a copy of which letter the escrow officer enclosed. Mr. Kavanaugh also stated in his letter to F. M. Cocke that it appeared to the escrow officer that Buyer had done everything that was required of Buyer to close the escrow. Copies of these letters are attached hereto as Exhibit D-M. Buyers' letter to the escrow agent, dated Mar. 5, 1969, specifies the enclosure of the two release checks for $32,000.00 to First National Bank of Arizona, one to account of Joan H. Cocke and the other to account of Francis M. Cocke, dated Mar. 7, 1969, and is not mentioned in Buyers' complaint as an exhibit or otherwise. Buyers' letter states as a condition to delivery of these two checks that escrow agent shall have "recorded the deeds and mortgages which deed is to include a deed to parcels 1A and 2A to the buyers."

Defendant alleges that the preparation and deposit by Buyers with escrow agent of the warranty deed including Parcel 2A and the half-interest in Parcel 1A for the signature of F. M. Cocke, and the handing by the escrow officer of such deed to F. M. Cocke for his signature, constituted an attempt by Buyers and escrow officer, together, to secure F. M. Cocke's signature to such deed, and in this connection defendant alleges that:

The effect of F. M. Cocke's signing of such warranty deed would have been to further extend the delay in closing the escrow until the successful conclusion of a quiet title suit for a marketable title to Parcel 2A and the undivided one-half interest in Parcel 1A, necessarily to be undertaken by F. M. Cocke in order to fulfill the new obligation which would have been so assumed by him. Inasmuch as the warranty deed was prepared, proffered for F. M. Cocke's signature, at the same time as the releases, the long delay which would have resulted from his signing of the deed would have begun almost simultaneously with the end of the earlier delay resulting from Buyers' failure to deposit the releases. Inasmuch as the $40,000.00 note taken from the escrow office by Mr. Tanner about Jan. 10, 1969 provided for interest to be paid thereon by F. M. Cocke beginning about Feb. 9, 1969, the saving to Buyers, and loss to Sellers, of interest on the balances due, which would not begin to accrue until the escrow closed, amounts to about $85.00 per day or about $31,000.00 per year.

Defendant alleges that the handing by the escrow officer on Mar. 5, 1969 in his office to F. M. Cocke for his signature of

the warranty deed which included Parcel 2A and a half-interest in Parcel 1A constituted a major breach of the escrow agent's fiduciary duty to F. M. Cocke, amounting to gross negligence, by the escrow officer's aiding in Buyers' attempt to secure F. M. Cocke's acceptance, by signing such deed, of Buyers' new demand.

In connection with the imposition, not part of the contracts between the parties, of delay on the landowners in their receipt of proceeds of a sale of the land, both principal and interest, defendant alleges that on April 2, 1969 James Stewart Company recorded in the records of Maricopa County Recorder the Agreement and Transamerica Escrow Instructions signed by the parties on Oct. 9, 1968, in Docket 7546, Page 398 - 405, following the same pattern as followed by Mr. Jarret Jarvis, law partner of Mr. Tanner, on Oct. 9, 1968 in recording the Stewart Title escrow instructions discussed above at Page 18, Lines 8 - 27.

Defendant alleges that by such recording Buyers have imposed on the landowners the burden of further delay by making necessary the removal of the cloud on title so cast, in addition to and beyond the delay risked by Sellers as inherent in the land sales and escrow contracts entered into by them, but which inherent delay was limited by the terms and provisions of such contracts, and defendant alleges that if the motive therefor be measured by the result thereof, such recording constituted an attempt by Buyers to coerce Sellers, or any of them, into foregoing their legal and contractual rights to terminate such contracts in accordance with the terms and provisions thereof and sell the land to another buyer without other and further hindrance.

Defendant alleges that by such recording on April 2, 1969, and the consequent imposition on Sellers, or any of them, of extra delay in the realization of proceeds of a sale of the land title to which was clouded by such recording, which extra delay was not imposed by the contracts between the parties, Buyers repudiated such contracts (if not already otherwise repudiated by them) and terminated same and abandoned all their rights thereunder, and further alleges that by reason of such recording and any consequent cloud on the title to the subject land, Sellers, or any of them, have been damaged in an amount equal to 6% interest on the value of the land title to which has been so rendered unmarketable, less the rental value to Sellers of the land for its present farming use, from the date of such recording until such cloud be removed by judicial action or otherwise.

IV

Defendant alleges that:

Paragraph IV of the complaint alleges:

> "That Defendant Joan H. Cocke has executed the Deed required to be executed by her, but Defendant Francis M. Cocke has refused to execute the Deed required to be executed by him."

and specifies:

> "Copies of said Deeds are attached hereto, marked collectively Exhibit "E", and by reference made a part hereof."

On May 15, 1969, twenty days after service of the complaint on F. M. Cocke, he filed a motion to dismiss for failure to state a claim upon which relief could be granted, or in the alternative, petitioned the Court to require plaintiffs to amend their complaint by furnishing copies to the Court and defendants of the deeds specified by Paragraph IV of the complaint (quoted above) but omitted. On May 16, 1969, Mr. Riggs, attorney for F. M. Cocke, received a letter from Mr. Tanner which stated that the two deeds referred to in the complaint as Exhibit "E" were enclosed, but instead of the deed alleged to be required to be executed by Joan H. Cocke, and alleged to be executed by her, the letter contained simply a copy of trustee Bank's special warranty deed, already attached hereto as defendant's Exhibit D-D. A copy of Mr. Tanner's letter with the enclosures other than deeds is attached hereto as Exhibit D-N, and the deed alleged to be the one this defendant refused to sign is attached hereto as Exhibit D-O.

Defendant alleges:

On June 3, 1969, at a brief hearing in chambers, the complaint was amended by the Court with plaintiff's approval to specify the deed executed by trustee Bank instead of the deed alleged to be required to be executed, and executed, by Joan H. Cocke. The original allegation, as stated, included by inescapable implication allegations (1) that the agreements required a deed to be executed by Joan H. Cocke conveying the 1/2 interest in Parcel 1, (2) that such deed was in existence, (3) that she had executed it and (4) that plaintiff had a copy of it to prove such allegations, that (5) life tenant Joan H. Cocke was

therefore the owner of legal title to such 1/2 interest in Parcel 1, and (6) was legally empowered to convey same, and (7) be properly paid for same, and that (8) therefore the note, mortgage and check aleady made out by plaintiff in favor of Joan H. Cocke and representing the deferred balance due on the trust property were in accordance with the agreements and in lawful and proper payment to her for such 1/2 interest in Parcel 1. The amendment approved by plaintiff admitted the falseness of these 8 allegations. Such payment to life tenant for the trust property was declared by escrow agent to be lawful and proper by Mr. Kavanaugh's letter of Mar. 10, 1969 to this defendant declaring that it appeared to him that Buyers had done everything required of them and such declaration amounted to gross negligence or attempted fraud. Copy of this letter is attached as defendant's Exhibit D-M, discussed herein at Page 22, Line 17 to Page 23, Line 3, and at Page 32, Line 31, et seq.

Defendant further alleges:

That immediately following the June 3, 1969 hearing in chambers a discussion was held in the anteroom between Mr. Tanner, Loretta Whitney, defendant Francis M. Cocke and L. Alton Riggs, at which discussion Mr. Tanner admitted that the deed which said defendant had actually refused to sign was the deed prepared by Mr. Tanner's law office, deposited by Buyers with escrow agent for Francis M. Cocke's signature, and handed by the escrow officer on Mar. 5, 1969 to Francis M. Cocke for his signature. This was the warranty deed which included, in addition to Parcel 2 and a half interest in Parcel 1 as earlier

agreed upon, Parcel 2A and a half interest in Parcel 1A not agreed to be conveyed or even quit-claimed by him to Buyers. This is the deed discussed herein at Page 20, Line 19 to Page 21, Line 8; at Page 23, Line 4½ to Page 24, Line 8; and Page 33, Line 12½. Alleges that the new warranty deed prepared by Buyers and enclosed in Mr. Tanner's letter received by Mr. Riggs on May 16, 1969, and also attached to plaintiffs' Response filed herein about May 28, 1969, was never seen by Francis M. Cocke until May 16, 1969 at Mr. Riggs' office, and alleges that such deed and the allegation that it is the deed which he refused to sign are both false, and that such deed was prepared by Buyers and such allegation made in an attempt to deceive the Court.

Denies that F. M. Cocke has refused to execute the deed required or agreed to be executed by him, and denies that he was or is required or has agreed to execute the deed prepared and enclosed by Mr. Tanner in his letter to Mr. Riggs dated May 15, 1969 as being the deed required to be executed by F. M. Cocke. Admits that he refused to execute the warranty deed which included Parcel 2A and an undivided one-half interest in Parcel 1A prepared by Buyers and deposited with escrow agent and submitted to him (F. M. Cocke) for his signature on Mar. 5, 1969 by the escrow officer, for the reasons set forth above in Paragraph I and II at Page 8, Line 1 to Page 9, Line 20; in Paragraph II (3) at Page 16, Line 10 to Page 17, Line 1; and in Paragraph III at Page 23, Line 4½ to Page 24, Line 8.

Alleges that he executed proper deeds to Parcel 2 and to his undivided one-half

interest in Parcel 1, describing such parcels as described by Brown Engineering's survey report attached to the complaint as plaintiffs' Exhibit A, and alleges that such deeds were delivered into escrow on or about Jan. 24, 1969 by Mr. Burton, the broker. Repeats, as alleged above (at Page 10, Line 11 to Page 11, Line 7, and Page 11, Lines 19 to 23) that the escrow officer stated on Mar. 20, 1969 that such deed to the half interest in Parcel 1 was satisfactory, but that such deed to Parcel 2 was not satisfactory, solely because of the inclusion therein of the $6.00 triangle, also discussed above at length in Paragraph II (1), at Page 10, Line 6 to Page 14, Line 15. Alleges that in Paragraph I of the complaint plaintiffs allege that F. M. Cocke is the owner of Parcel 2 and presently legally able to convey same as such Parcel 2 is described in plaintiffs' Exhibit A of the complaint (Page 1 of complaint, Line 26 to Page 2, Line 5½), and alleges that such description includes the disputed $6.00 triangle, and plaintiffs are estopped to reverse their position.

V

Answering Paragraph V of the complaint, denies that defendants agreed to execute and deliver any deed to Parcels 1A or 2A to Buyers, whether quit claim or warranty, admits that copies of quit claim deeds, prepared by Buyers, describing a narrow strip of land are attached to the complaint, marked Exhibit "F", and by reference made a part thereof, and alleges that the narrow strip of land described in such deeds is Parcels 1A and 2A as described by Brown Engineering Company in the descriptions attached to the complaint in plaintiffs' Exhbiit "A". Admits as allege by plaintiffs that the narrow strip of land includes the easement area of the Jenkins Ditch but denies that it includes more than half of the power line easement. Denies that plaintiffs agreed to accept and pay for more land than the land described in the agreement of purchase; alleges that the agreement provided for the sale and purchase of the land north of the north bank of Jenkins Ditch; that by accepted usage by the engineering profession in this area "to the bank" means "to the water's edge" to include access to the water for both drainage and stock watering purposes; and that Buyers agreed to buy and pay for the land north of the north water edge of Jenkins Ditch for access to the actual stream for the existing storm drain waterways, without which waterways Buyers would have been unable to obtain building permits.

Alleges that the 1892 grant of easement for Jenkins Ditch (Exhibit D-F, mentioned above in Paragraph II hereof at Page 9, Line 21 1/2) specifies an easement some 2 rods or 33 feet south of the present

location of the Ditch, and that plaintiffs themselves have alleged in Paragraph V of the complaint that the easement area of the Jenkins Ditch does not extend north of the north water edge thereof, such easement area being included in the narrow strip, Parcels 1A and 2A, and are estopped to claim otherwise.

Further answering Paragraph V, alleges that the deed included in plaintiffs' Exhibit F and prepared by Buyers for the signature of Joan H. Cocke is sufficient to quit claim to Buyers only the interest of life tenant in the undivided one-half interest in Parcel 1A described in such deed, leaving undisturbed the equitable interests in Parcel 1A of the remaindermen. Alleges that the required 10-year adverse possessory interest of Joan H. Cocke and Francis M. Cocke in Parcel 1A was community property, as was Parcel 1, and that by the Property Division Agreement of Jan. 24, 1964, all her community interest in the farm land was made subject to the irrevocable trust. Alleges that no quit claim possessory interest in Parcel 1A was included in the Bank's special trustee warranty deed of legal title to Parcel 1, discussed above in Paragraph I hereof, at Page 6, Line 20 1/2 to Page 7, Line 21 1/2, and in Paragraph II (2) at Page 15, Line 26, to Page 16 Line 5 1/2.

VI

Answering Paragraph VI admits that Schedule A attached to the Escrow Instructions, in the 4th and 8th paragraphs, provides that Seller shall execute partial releases of mortgage in about 5-acre tracts; alleges Buyers verbally agreed to prepare

the release forms, including the location by particular description of each separate parcel, in accordance with their own particular plan for development of the area to be purchased; alleges that Sellers agreed in Paragraph 1 of the Agreement to cooperate with Buyer in altering the boundaries of any of the executed releases to fit the needs of Buyer; alleges that such release forms were impliedly required by Schedule A to be prepared and deposited by Buyers with escrow agent for signature of Sellers by Dec. 15, 1968, the scheduled date for closing of escrow, but that Buyers delayed such deposit until Mar. 4, 1969, without approval by Sellers of such delay.

Alleges that on Mar. 5, 1969 this defendant executed 25 releases handed to him by the escrow officer as being the release forms, and all of them, prepared and deposited by Buyers for F. M. Cocke's signature, as alleged above in Paragraph III, at Page 20, Lines 9 - 25; and alleges that escrow agent was instructed to hold such executed releases, as provided by Schedule A, and that therefore F. M. Cocke did not obtain copies of the 25 releases he executed and is therefore unable to determine at this time in what respects they differ, if at all, from the 25 release forms attached to the complaint as Exhibit G and claimed by Buyers to be copies of the releases which F. M. Cocke has refused to execute.

VII

Answering the last paragraph of the complaint, Paragraph VII, alleges that Buyers are bound not only by the covenants, terms and conditions, expressed or implied, of the Agreement, but also by those of the

Escrow Instructions, as later modified by action of parties, and Schedule A attached to such Instructions, and also by those of trustee Bank's instruction deposited in escrow along with its special warranty deed of legal title, which Agreement and instructions are included by Buyers in their own Exhibits B and C of the complaint; denies that Buyers performed all the covenants, terms and conditions so required to be performed by them on or before Mar. 18 or Mar. 19, 1969; alleges that Buyers failed to perform or otherwise violated the covenants, terms and conditions, expressed or implied, agreed to by them, in the manner and at the times set forth in this answer and counterclaim and cross-claim; and alleges that the later readiness, willingness and ability, later expressed by Buyers, to later pay the purchase money, or future sums when due, or to later comply with any or all of the other covenants, terms and conditions agreed to is immaterial, because of the agreement for cancellation, and their earlier repudiations as herein alleged.

VIII

Further alleges that life tenant, Buyers and escrow agent all had full notice of J. H. and F. M. Cocke's letter of Oct. 10, 1968 to trustee Bank, and full notice of the instruction to the escrow agent from trustee Bank that the proceeds of sale of the trust property were to be governed by instructions from Joan H. Cocke and F. M. Cocke, (discussed above in Paragraph I, at Page 4, Line 2 to Page 5, Line 9), and alleges that life tenant, Buyers and escrow agent had full notice of the instruction to escrow agent from resulting trustee F. M. Cocke,

(trustee discussed above in Paragraph I, at Page 7, Lines 22 1/2 - 32) that the principal proceeds of sale of the trust property were to be distributed by check made payable to Joan H. Cocke and Francis M. Cocke, which parties were to be the joint mortgagees of the mortgage securing the deferred payment of such proceeds (also discussed above in Paragraph I, at Page 5, Lines 9 - 28 1/2); and alleges that life tenant, Buyers and escrow agent were all bound by such instructions, regardless of any secret agreement between Buyers and life tenant or her attorney, or between Buyers, life tenant or her attorney, and escrow agent, and notwithstanding any judgment or order, now on appeal, without supersedeas bond, of the Superior Court of Maricopa County adversely affecting the interests of the remaindermen in the trust corpus but issued upon proceedings had without notice to and in the absence of such remaindermen, or any of them, or legal representative of any remainderman; and further alleges that therefore the refusal of life tenant to sign any instructions governing the distribution of the trust proceeds (discussed above in Paragraph I, at Page 5, Lines 5 1/2 - 28 1/2), and any refusal by life tenant to sign the releases, unless the trust proceeds be paid to her free of trust, and the payment to life tenant of the principal proceeds of the sale of the trust property proposed and attempted by Buyers and life tenant, by the preparation and deposit with escrow agent of the note, mortgage and release check representing such trust proceeds but made out in favor of or to the account of life tenant (discussed above in Paragraph I, at Page 5, Line 29 1/2 to Page 6, Line 19 1/2 and also in Paragraph

II (2), at Page 14, Line 19 to Page 16, Line 5 1/2), and the acceptance by escrow agent of such note, mortgage and check from Buyers, and escrow agent's subsequent announcement through its escrow officer that it appeared to such officer that Buyer had done everything that was required of Buyer to close the escrow, such announcement being made by such officer by letter of Mar. 10, 1969 (discussed above in Paragraph III, at Page 22, Line 17 to Page 23, Line 3 1/2, and attached hereto in Exhibit D-M), all in violation of such instructions, constituted an attempt by life tenant, Buyers and escrow agent, together, to divest the remaindermen of their vested interests in the trust undivided one-half interest in Parcel 1 or proceeds of sale thereof; and alleges that such attempt constituted a major breach, whether fraudulent or negligent, of escrow agent's fiduciary duty to F. M. Cocke, both for himself and the remaindermen; and alleges that by such breach and by the breach committed by escrow agent's escrow officer on or about Mar. 5, 1969, (discussed above in Paragraph III, at Page 20, Lines 19 - 31 and at Page 23, Line 4 1/2 to Page 24, Line 8) by the officer's acceptance from Buyers of the warranty deed including Parcel 2A and the half interest in Parcel 1A and the handing of such deed by such officer to F. M. Cocke for his signature, whether negligent or fraudulent, escrow agent Transamerica assumed full liability to F. M. Cocke for himself and the remaindermen for all damage suffered by reason of such breaches or either of them. Further alleges that if Transamerica was a party to the recording of any agreement or escrow instructions (discussed above at Page 24, Line 10 to Page 25 Line 18) by delivery of

original documents to Buyers, Transamerica is likewise guilty of a major breach of such fiduciary duty, and liable therefor.

And further alleges that life tenant, Buyers and escrow agent are jointly and severally liable for any loss to the remaindermen's interest in the trust corpus resulting from such violations of such instructions; and further alleges that the releases prepared by Buyers and deposited by Buyers with escrow agent and accepted by escrow agent and submitted by escrow agent to Joan H. Cocke or her attorney for signing by Joan H. Cocke and alleged by Buyers to have been signed by her and copies of which are attached to the complaint as Exhibit G are not sufficient, in view of the proposed payment of trust proceeds to life tenant, to release the various parcels described in such releases from the equitable interests of the remaindermen, and either the land sought to be so released or the proceeds of release payments may be followed to recover any loss resulting to the remaindermen's interests in the trust corpus by reason of any such purported release.

Defendant alleges that as provided by ARS Rule 17(a) of Civil Procedure Francis M. Cocke as a party to the Property Division Agreement of Jan. 24, 1964 may sue in his own name, as named in said Agreement, for the benefit of the remaindermen without joining them in the suits.

IX

Defendant repeats (as alleged and discussed above in Paragraph II (1), at Page 10 Line 6 to Page 11 Line 23, and in

Paragraph IV at Page 27, Lines 10 1/2 - 23 1/2) that on Mar. 20, 1969 Transamerica escrow officer, Mr. Kavanaugh, stated to F. M. Cocke, before a witness, that Transamerica was unwilling to insure title to Parcel 2, as described in F. M. Cocke's deed to James Stewart Company (deposited in escrow about Jan. 24, 1969) because of the inclusion of the $6.00 triangle; and alleges that on Mar. 21, 1969 and again on April 3, 1969, before a witness, such escrow officer made it clear that Transamerica still claimed (without reasonable basis therefor) such title to be unmarketable and uninsurable and again stated that Transamerica was unwilling to issue a title insurance policy thereon. As alleged above at Page 10, Line 27 - 32, on Mar. 21, 1969 the escrow officer refused F. M. Cocke's verbal demand, and on April 3, 1969 refused F. M. Cocke's written demand, for the documents signed by him the return of which is provided for by the escrow instructions. Alleges that Paragraph 24 of the fine print instructions, an enlarged copy of which instructions is attached hereto as Exhibit D-L, provides:

> ". . . or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided for herein, Escow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow

> Agent shall be returned to the parties who executed said documents. Mutually executed instruments shall be retained by Escrow Agent."

and defendant alleges that escrow agent's verbal refusal to return to F. M. Cocke on Mar. 21, 1969 the documents earlier executed by him and on that day verbally demanded by him, and its further failure, if any, to retain the mutually executed instruments, were contrary to and in violation of Paragraph 24 of the fine print escrow instructions (prepared by Transamerica itself) directing the return of documents executed by F. M. Cocke and the retention of documents mutually executed by Buyer and Seller. Defendant alleges that escrow agent's written refusal on April 3, 1969 to return to F. M. Cocke upon written demand the documents executed by him was also in violation of Paragraph 24. A copy of such written demand, with escrow agent's refusal typed and signed thereon, is attached hereto as Exhibit D-P.

Defendant further alleges that the cancellation provisions contained in the fine print escrow instructions (Exhibit D-L), being Paragraph 16 through 25, provide, in the event notice of cancellation is given by one of the parties to the escrow agreement, in Paragraph 18 and 22 that:

> "In the event said other party shall fail within said thirteen day period to comply with all of the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized:

> "Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent."

and defendant alleges that escrow agent's refusal to return upon demand to F. M. Cocke on Mar. 21 and April 3, 1969 the documents earlier executed by him, and its failure, if any, to cancel and retain the documents earlier executed by both Seller and Buyer, were contrary to and in violation of Paragraphs 16 through 22 of the fine print escrow instructions.

Defendant alleges that Transamerica by violation of the provisions of its own printed escrow instructions as set forth above in this Paragraph IX violated the escrow agreement entered into by it with F. M. Cocke, both for himself and the remaindermen, and alleges that such violation constituted a major breach of its fiduciary duty to F. M. Cocke, both for himself and the remaindermen, and that Transamerica is therefore liable for any damages resulting from such breach of such fiduciary duty and suffered by F. M. Cocke, for himself or the remaindermen.

Defendant further alleges that if any failure of escrow agent to mark "cancelled" as provided by the escrow instructions any instruments executed by sellers and buyers or if any failure to retain same, as so provided, aided or made possible the recording by Buyers of the Agreement and escrow instructions recorded by Buyers on April 2, 1969, escrow agent by such

failure committed a major breach of its fiduciary duty to F. M. Cocke, both for himself and the remaindermen, and is liable for resulting damage.

X

Defendant denies all material allegation of the complaint not specifically admitted herein.

XI

PARTIAL SUMMARY OF ALLEGATIONS OF COUNTERCLAIM AGAINST PLAINTIFFS AND AGAINST TRANSAMERICA AND CROSS-CLAIM AGAINST JOAN H. COCKE

1. That Buyers repudiated the agreements for sale and purchase by making out the note, mortgage and check, representing balances due on trust property, in favor of life tenant Joan H. Cocke, and depositing same in escrow and failing to correct same. Page 15, Line 9.

2. That Buyers repudiated the agreement for sale and purchase by preparation and deposit with escrow agent for F. M. Cocke's signature the deed conveying Parcel 2A and the 1/2 interest in Parcel 1A, constituting a new demand. Page 20, Line 31.

3. That the agreements were cancelled at the close of the 13-day period on Mar. 18 or 19, 1969 (if not before) in accordance with the escrow instructions, by Buyers failure to redeposit the $40,000 note and mortgage or substitute funds in the amount of $20,000, and also by their failure to correct the proposed

payment of trust proceeds to life tenant, before the close of the 13-day period. Page 22, Line 3.

4. That the handing by the escrow officer on Mar. 5, 1969 to F. M. Cocke for his signature of the warranty deed which included Parcel 2A and a half interest in Parcel 1A constituted a major breach of escrow agent's fiduciary duty to F. M. Cocke, amounting to attempted fraud, by the escrow officers aiding in Buyers' attempt to secure F. M. Cocke's acceptance, by signing such deed, of Buyers' new demand. Page 23 Line 4 1/2 and Page 24 Line 1.

5. That Buyers by their recording on April 2, 1969 of the Agreement and Escrow Instructions repudiated such contracts (if not already repudiated by them)by the imposition of extra delay on Sellers, not imposed by such contracts, in removing the cloud on title so cast before Sellers could realize proceeds from a sale of the land title to which was so clouded. Page 25 Line 3.

That Sellers have been damaged by such recording in an amount equal to 6% interest on the value of the land title to which has been so rendered unmarketable, less the rental value to Sellers of the land for its present farming use, from the date of such recording until such cloud be removed by judicial action or otherwise. Page 25, Line 11 1/2.

6. That the amendment to the original complaint, made at the hearing on June 3, 1969 by the Court with the approval of Mr. Tanner for plaintiffs, admitted the falseness of the original allegation

that Joan H. Cocke had executed a deed to the trust 1/2 interest in Parcel 1, and the falseness of the allegation necessarily implied therefrom that payment to her of the proceeds of sale of the trust property was in accordance with the agreements and was lawful and proper. Page 26, Line 19 1/2.

That by escrow officer's letter of March 10, 1969 escrow agent declared such payment to life tenant to be in accordance with the agreements and lawful and proper, and such declaration amounted to gross negligence or attempted fraud. Page 26a, Line 8.

7. That immediately following the June 3, 1969 hearing Mr. Tanner admitted that the deed that F. M. Cocke had actually refused to sign was the deed handed to him by the escrow officer on March 5, 1969, which included Parcel 2A and the 1/2 interest in Parcel 1A (Page 26a, Line 17 1/2);

that Francis M. Cocke had never seen the new deed prepared by Buyers and enclosed in Mr. Tanners' letter to Mr. Riggs until May 16, 1969 at Mr. Riggs office (Page 26b, Line 1); and

that such new deed so prepared and the allegation in the complaint that it is the deed which he refused to sign, are both false, and that such deed was prepared by Buyers, and such allegation made in an attempt to deceive the Court. (Page 26b, Line 5 1/2).

8. That F. M. Cocke executed proper deeds to Parcel 2 and to his undivided 1/2 interest in Parcel 1, describing such parcels as described by the Brown

Engineering survey report attached to the complaint as plaintiffs Exhibit A; and

that such deeds were delivered into escrow by the broker on or about January 24, 1969. Page 27, Line 11.

9. That defendant F. M. Cocke executed 25 releases handed to him on March 5, 1969 by the escrow officer as being all of the releases prepared and deposited by Buyers for F. M. Cocke's signature, but did not obtain copies and is therefore unable at this time to determine in what respects such executed releases differ, if at all, from the 25 releases claimed by Buyers to be the releases which F. M. Cocke has refused to execute. Page 30, Line 11.

10. That Buyers are bound not only by the covenants, expressed or implied, of the Agreement but also those of the Escrow Instructions as later modified by action of the parties and by those of trustee bank's instruction; that Buyers failed to perform as herein set forth; and that later readiness, willingness and ability later expressed by Buyers to later comply with the covenants, terms and conditions agreed to is immaterial because of the agreement for cancellation and their earlier repudiations as herein alleged. Page 30, Line 27.

11. That life tenant, Buyers and escrow agent were all bound by the instructions accompanying trustee Bank's special warranty deed that distribution of the proceeds of sale of the trust property was to be controlled by Joan H. Cocke and Francis M. Cocke, and were all bound by the instructions from resulting trustee

F. M. Cocke (Page 32, Line 4 1/2); and that the payment to life tenant of proceeds of sale of the trust property in violation of such instructions, proposed by Buyers and life tenant and approved by escrow agent, constituted an attempt by all of them to divest the vested interests of the remaindermen in such trust property (Page 32, Line 16); and

that life tenant, Buyers and escrow agent are jointly and severally liable for any loss to the remaindermens' interest resulting from such violations of such instructions (Page 33, Line 29 1/2); and

that such attempt to divest such interests constituted a major breach, whether negligent or fraudulent, of escrow agent's fiduciary duty to F. M. Cocke, both for himself and the remaindermen (Page 33, Line 9); and

that by such breach and the breach of March 5, 1969, by escrow officer's acceptance and handing to F. M. Cocke for his signature of the warranty deed including Parcel 2A and the half interest in Parcel 1A, whether fraudulent or negligent, escrow agent assumed full liability to F. M. Cocke for himself and the remaindermen for all damage suffered by reason of any such breach (Page 33, Line 12 1/2).

12. That as provided by ARS Rule 17(a) Francis M. Cocke as a party to the Property Division Agreement of January 24, 1964 may sue in his own name, as named in said Agreement, for the benefit of the remainderman without joining them in the suits. Page 34, Line 13 1/2.

13. That Transamerica's refusal on March 21 and April 3, 1969 upon demand by F. M. Cocke to return to him the documents earlier executed by him and its failure, if any, to cancel and retain the documents earlier executed by both Seller and Buyer were contrary to and in violation of Transamerica's own escrow instructions, and so in violation of the escrow agreement entered into by it with F. M. Cocke both for himself and the remainderman (Page 34, Line 24); and

that such violation constituted a major breach of Transamerica's fiduciary duty to F. M. Cocke, both for himself and the remainderman (Page 36, Line 23); and

that Transamerica is therefore liable for any damages resulting from any such breach (Page 36, Line 30).

14. That if any failure of escrow agent to mark "cancelled" as provided by the escrow instructions any instruments executed by sellers and buyers or if any failure to retain same as so provided aided or made possible the recording by Buyers of the Agreement and escrow instructions recorded by Buyers on April 2, 1969, escrow agent by such failure committed a major breach of its fiduciary duty to F. M. Cocke, both for himself and the remaindermen, and is liable for resulting damage. (Page 37, Line 1).

WHEREFORE, Francis M. Cocke as defendant, counterclaimant against plaintiffs and against Transamerica, and cross-claimant against defendant Joan H. Cocke prays

as part of the answer that plaintiffs

take nothing by their complaint;

as part of the counterclaim against plaintiffs that the complaint be dismissed for failure to state a claim upon which relief can be granted; and

as part of the counterclaim against plaintiffs and Transamerica and the cross-claim against defendant Joan H. Cocke:

1. that the court rule that the agreements for sale and purchase of Parcels 1 and 2 were repudiated and terminated by acts, or failure to act, of Buyers and that Buyers so abandoned all their rights thereunder.

2. that the Court rule that Transamerica as escrow agent and title insurer has been guilty of multiple breaches of its fiduciary duty to F. M. Cocke, for himself and the remaindermen, amounting to gross negligence or fraud or attempted fraud, and is liable to him for damage suffered by reason of any such breach, for himself and the remaindermen.

3. that the Court rule that Joan H. Cocke as resulting or constructive trustee has been guilty of major breach of her fiduciary duty to F. M. Cocke, for himself and the remaindermen, and has abandoned any advantage, if any, accruing to her as life tenant from the agreements or any of them.

4. that the Court rule that the special warranty deed to all of Parcel 1 executed by trustee Bank be cancelled and returned to trustee Bank.

5. that the Court rule that the $4515

received as earnest money on the trust property be paid to trustee Bank as trust principal or as trust income, whichever to the Court may seem just and meet.

6. that the Court rule that the deeds to Parcel 2 and the 1/2 interest in Parcel 1 executed by F. M. Cocke and on deposit with escrow agent be returned to F. M. Cocke, and that the instruments executed by sellers and buyers be marked "cancelled" and retained by escrow agent, all as in the same manner as provided by the escrow instructions.

7. that the Court rule that the releases executed by Joan H. Cocke and those executed by F. M. Cocke be marked "cancelled" and returned to the party who executed them.

8. that the Court rule that in the proportions to be determined by the Court, Buyers and Transamerica shall jointly pay to trustee Bank and to F. M. Cocke, separately, as damage suffered by them as holder or owner of Parcels 1 and 2, by reason of the cloud on title to such land cast by the recording of the Agreement and Escrow Instructions by Buyers, 13 days after the day on which Transamerica had agreed to mark such documents "cancelled", an amount of money equal to 6% per annum of the agreed sale price of Parcels 1 and 2 for the period beginning March 20, 1969 and ending on the day such cloud be removed by judicial action or otherwise.

9. that the Court grant to this defendant, counterclaimant and cross-claimant such other and further relief as be meet and just in the premises.

RIGGS & RIGGS

By /s/ L. Alton Riggs, Jr.

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Attorney for Defendant
Francis M. Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART COMPANY, Plaintiff, vs. FRANCIS M. COCKE, et al, Defendant	No. C-222472
FRANCIS M. COCKE, et al, Plaintiff, vs. TRANSAMERICA TITLE INSURANCE COMPANY, Defendant.	

Mesa, Arizona
February 27, 1970
10:10 o'clock, A.M.

DEPOSITION OF HENRY KAVANAUGH

Prepared for:

Original - Superior Court

Copies - Individual Attorneys

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Court Reporter

S T I P U L A T I O N

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action, through their respective attorney, that the deposition of HENRY KAVANAUGH herein, may be taken upon cross examination as an adverse party by the Plaintiff, before ELSIE CHILDRESS, a Notary Public and Court Reporter, in and for the County of Maricopa, State of Arizona, in the offices of JOHNSON, SHELLEY, ROBERTS & RIGGS, 48 N. Mcdonald Dr., Mesa, Arizona, on the 27 day of February, 1970, commencing at the hour of 10:10 o'clock, A.M.

IT IS FURTHER STIPULATED that all objections as to form of questions or answers and except as to errors which might be obviated or cured at the time of the taking of the deposition are reserved until the time of trial.

IT IS FURTHER STIPULATED that the witness may read and sign the deposition at the end thereof, and that the requirements of the statutes relating to the return of and notice of filing of the deposition are waived.

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Mesa, Arizona
February 27, 1970
10:10 o'clock,A.M.

MR. RIGGS: Mr. Kavanaugh, I am sure you have had your deposition taken many times?

WITNESS: Several times.

MR. RIGGS: You are aware of the nature of the deposition?

WITNESS: Yes.

Whereupon,

HENRY KAVANAUGH

a witness of lawful age, being first duly sworn, upon his oath by the Notary to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. RIGGS:

Q. Would you please state your name?

A. Henry Kavanaugh.

Q. Would you tell us what company you are affiliated with?

A. I am Escrow Agent - Officer - of Transamerica Title Insurance Company.

Q. How long have you been so engaged?

A. Seventeen and-a-half years.

Q. Were you Escrow Agent of the Account 0201311-7, the parties of which is Francis M. Cocke, divorced man, Joan Cocke, divorced woman, and James Stewart Company, Arizona Corporation and/or the nominees?

A. I was - or, I am.

Q. Was this Escrow dated October 9, 1969?

A. It was.

Q. Was it signed by four parties?

A. Yes.

Q. Do you recall the names of parties?

A. Francis M. Cocke, Joan Cocke, Mr. Tanner, in behalf of the Buyer.

Q. Was there anyone else who signed that; was it D. R. Burton?

A. Yes; he was the real estate broker.

Q. Do you have copies of the escrow with you?

MR. GILLENWATER: I do.

MR. RIGGS: Do you have the original with you?

MR. GILLENWATER: I do.

MR. RIGGS: I wonder if Counsel would mind handing the Deponent the copy?

MR. GILLENWATER: Off the record.
(Discussion off the record)

MR. RIGGS: Back on the record.

Q. (By Mr. Riggs) I would like you to have those for reference to the questions I will ask.

Were the escrow instructions together with the sales agreement, dated October 9, 1969, considered to be the total contract for the sale of the property described therein?

MR. GILLENWATER: I will object to the form of question; it calls for a legal conclusion. You can go ahead and answer.

WITNESS: According to the terms of the escrow, these instructions under certain sales agreement entered into October 9, between the Buyer and Seller, constituted a binding agreement set forth in the escrow. Is that what you had reference to?

MR. RIGGS: Yes sir; thank you.

Q. (By Mr. Riggs) From the escrow agreement, would you -- what land parcels, number 1 and 2?

A. Yes.

Q. Was the escrow agreement closed on December 15, 1968?

A. Yes.

MR. GILLEN: Could we have the record show all objections, except to form and foundation, will be reserved until time of trial?

MR. RIGGS: Yes.

Q. (By Mr. Riggs) I wonder, for the purpose of the record, would you read the fine print under instruction, number 33?

A. Time is of the essence of any agreement to pay or perform hereunder which agreement shall remain unpaid or unperformed as of close of escrow. No payment by buyer or mortgagor of such amounts shall be received or receipted for by Escrow Agent unless all amounts due as of the

date of compliance are paid unless and until written authority therefor has been delivered by Escrow Agent by the payee of said amount.

Q. I think that is the instruction in all your escrow agreement.

A. I believe that is true.

Q. Do you have any idea or know why the escrow did not close as scheduled on 12/15/68?

A. One of the main reasons, I would say the inability of Mr. and Mrs. Cocke to give me instructions compatible to each of them regarding the deed, I requested and received from the First National Bank, which one of the title requirements.

Q. Was that the only reason it didn't close, in your estimation?

A. We had the deed Mr. Cocke had given us; to which we felt was uninsurable, but I would say, probably the main reason, was the failure of parties to agree.

Q. Had Mr. Cocke put certain releases in escrow by the 15th of December, 1968, as required by the escrow instructions?

A. I don't know if he put it in at that time, or until later, they were put in.

Q. Did you prepare those releases, or Mr. Cocke?

A. As I recall, it came from Mr. Tanner's office.

Q. You are not certain what date they were put in escrow?

A. No response.

Q. Would you have notes that would tell you?

A. I may have correspondence that would tell me.

Q. I wonder if you will take a moment to check that, please?

A. I received them on the 25th of February, 1969.

Q. What indication do you have that they were received on February 25th?

A. I have a cover letter from Wallace O. Tanner dated the 24th, stamped received by us at 8:00 o'clock, as of the 25th.

Q. Are you acquainted with the other escrow instructions not directly related to this escrow or Court reference to Fannin escrow covering the same property?

A. Yes. I was aware there were copies of escrow instructions on file. In fact, I think, we made the requirement as a result of those.

Q. Did Transamerica take the document of that because of the cloud of title in the escrow instructions 0201311-7?

A. It appeared to us there was such a cloud, and as a result of those instructions, we felt we should have a quitclaim deed or something similar, from Fannin, -

the Firm of Fannin - which was later deposited to escrow.

Q. Who was the description made by?

A. The Title Department or the Executive area.

Q. Subsequent to knowing about this cloud on the title, did you learn of a mutual agreement between Mr. Fannin and Mr. Cocke?

A. I did.

Q. Do you know whether or not Francis M. Cocke entered a 13 day cancellation notice as early as February 13, 1969?

A. He filed one on the 3rd of February, 1968, it appears.

Q. Is there any cancellation he noticed subsequent to December 3, and March 5, 1969?

A. That is the only two.

Q. Do you know the reason for the first cancellation in December of 1968?

A. I believe it was due to the fact there was $44,000, coming to the escrow as of the first of December.

Q. Had that not come by the first?

A. It had not.

Q. Of course, that was the duty of the Buyer to get it in there by December 1st?

MR. GILLENWATER: I will object. It calls for a legal conclusion. The Document speaks for itself.

You may answer.

WITNESS: The escrow instructions call for it, that on or about December 1, 1968, $44,000, to be deposited in escrow.

Q. (By Mr. Riggs) On or about January 10, did you meet Mr. Francis Cocke and some other party to this transaction, in connection with Mr. Cocke's drawing out some money?

A. I did.

Q. Who was present at that time, do you recall?

A. As I recall, Mr. Tanner, Mr. Cocke, and Mr. Burton.

Q. Where was that meeting held?

A. At my office.

Q. Do you recall the approximate time of the day it was held?

A. I believe it was in the afternoon.

Q. You do recall it was on January 10th?

A. I couldn't recall the exact date.

Q. On that day, did you make out and deliver a check to Francis M. Cocke, and Joan Cocke?

A. Yes.

Q. What was the amount?

A. Twenty thousand dollars ($20,000).

Q. Whose funds was the check drawn on?

A. The escrow account. Is that what you have reference to?

Q. Yes. In connection with that, did you write up a little amendment to the escrow instructions on that date?

A. I did.

Q. Do you have the original of that?

A. Yes.

Q. For the record, would you read that?

A. 'You are hereby instructed to release from the funds deposited by the undersigned, the sum of $20,000, payable to Francis M. Cocke, immediately prior to closing of escrow; it being understood that you are not in any way to be held liable for return of these funds,

Should the escrow fail to close, for any reason, whatsoever'. Signed by James Stewart, Wallace O. Tanner, and properly, by Francis M. Cocke.

Q. Is that the check that you delivered to Mr. Cocke? Did he execute the Note and Mortgage?

A. Yes, he did.

Q. Do you have the original of the Note and Mortgage?

A. I do not.

Q. Did you receive it that day?

A. Did I?

Q. Yes.

A. No.

Q. Do you know in whose custody it is?

A. Mr. Tanner.

Q. In what amount?

A. Forty thousand dollars, ($40,000).

Q. Did you consider the $20,000, that was given to Mr. Cocke, to be part of the escrow fund?

A. I did.

Q. Did you consider the $40,000, Note and Mortgage Documents a part of the papers of the escrow?

A. I did not.

Q. What was the reason for that?

A. I had nothing to do with it. It was strictly between Mr. Tanner and Mr. Cocke.

Q. Did the other parties to the escrow instructions approve this advance to Mr. Cocke?

A. No, sir.

Q. Why didn't they approve it?

A. I didn't require it, because it was cash payment; not earnest money, nor forfeitable. As far as I am concerned, James Stewart Company could have withdrawn the $44,000 at any time.

Q. Then, it is your position, the Note and Mortgage never did get back in escrow?

A. I never had any instructions for it.

Q. Then, it was sort of a verbal agreement to this $20,000, the way it was written -- is that right, no agreement in writing, other than the Note and Mortgage to back it up?

A. Well, I had my instructions. I read the instructions, instructing me to write Mr. Cocke a check for $20,000. That is all the instructions I had.

Q. Then, it was agreeable to the James Stewart Company - they were agreed to by them?

A. Oh, yes!

Q. I wonder if you would, for the record, read the fine print of the Instructions 2, of the escrow instructions?

A. 'SELLER and BUYER: Will deliver to escrow agent all documents, pay to escrow agent all sums and do or cause to be done all other things necessary in the sole judgment of escrow agent, to enable him to comply herewith, and to enable Transamerica Title Insurance Company to issue any Title Insurance policy provided for, herein'.

Q. Don't the "Things" under number 2, all documents, would have included the Note and Mortgage?

A. As I stated, it was strictly between them, what security Mr. Tanner wanted for money, or what Mr. Cocke was willing to give Mr. Tanner.

It had nothing to do with escrow. I had all I could do to account for the money.

That is all the instruction I had for money given into my safekeeping.

Q. I think we have asked this question before, but if the escrow were otherwise ready to close, is it your position the escrow could close without the Note returned to Mr. Cocke, without the advance, and be washed out?

A. Absolutely.

Q. At any time subsequent to December of 1968, were Mr. and Mrs. Horne ever nominated as Purchaser, under the escrow number 02013111-7?

A. I don't recall the exact date. On January 2, I was advised.

Q. Were Mr. and Mrs. Horne both named as nominees, at the time?

A. Yes; two respective interests. I think he was to get 75%, as sole, separate property, and she was to get 25%, as sole, separate property.

Q. Is there any instrument other than

the letter of January 2, 1969, for proof of that?

A. Yes.

Q. Is that written to you from James Stewart Company under James Stewart and Seth Horne's signature?

A. Yes.

Q. Are there any documents or instruments that you know of, other than the letter, in which he was named as nominee?

A. I don't believe it was put in.

Q. What I am wondering is, if they passed a resolution; if you received anything besides the letter?

A. I don't believe I have. No, I am sure I haven't.

Q. Did you notify Mr. Cocke of this nomination, at any time?

A. I would assume so. I don't recall the time or date. We had quite a few conversations subsequent to that time. I presume it came out in the conversation.

Q. Did you, by any written instructions, notify him, of your own knowledge?

A. I don't believe so.

Q. Did you receive a special Warranty Deed from the First National Bank of Arizona, as Trustee, in the Fall of 1968?

A. I did.

Q. Do you have the original deed in your file?

A. I should have; yes.

Q. Would you check it against my copy?

A. Yes.

Q. Did you, with the Deed, receive a letter of instructions signed by the Trustee Officer?

A. I did.

Q. I wonder if you have a copy of that letter here, also?

A. (Witness looks through file)

Q. Referring to the second paragraph, did that letter instruct you to place the Deed in escrow; executed by the parties, according to the rule governing distribution of sale, of funds, cosigned by Francis M. Cocke?

A. Yes.

Q. What interest in Parcel 1, did that grant, all or half interest in Parcel 1?

A. It granted all.

Q. Do you recall if Mr. Cocke objected to the Deed granting all of Parcel 1?

A. I do.

Q. Do you know why?

A. He didn't own it all.

Q. What did you tell Mr. Cocke at that time?

A. As far as I was concerned for Title Insurance, the permanent Deed was sufficient. They had given all they had. They aren't retaining anything.

Q. Then, you are aware in your own mind, the Trustee only had half interest in Parcel 1?

A. That is right.

Q. From your standpoint of the Title, is there any objection to Trustee Deed?

A. No.

Q. Do you remember on a certain date in March, Mr. Cocke executed a number of releases presented by the Buyers?

A. Yes.

Q. Do you recall the date - was it March 1st?

A. I don't recall the date.

Q. I wonder if you have some of the releases that you might have the date?

A. That is what I am looking for. I don't even have the release. Yes, they were acknowledged before on March 5, 1969.

Q. Had you, prior to March 5, notified Mr. Cocke that the release had been received into escrow?

A. I don't recall.

Q. Are these copies of the release that you have there?

A. Yes, I am sure they are.

Q. Thank you. Do you recall how many releases there were?

A. I don't recall the exact number, no.

Q. Was it twenty - something like that?

A. Something like that, yes.

Q. As Mr. Cocke signed the release, did you hand him to sign the Deed, that was prepared for the purchase by the Buyer?

A. Yes.

Q. Do you have that Deed?

A. Yes, I believe this is the one here. I remember one Deed that had four parcels on it.

Q. You are referring to Parcels 1, 2, and 1A, and 2A?

A. Right.

Q. Do you recall if that was delivered to Mr. Cocke on the 5th of March?

A. I could be wrong, but as I recall, it was at an earlier date, and he objected to it. I believe I called Mr. Tanner that same day.

Q. Do you recall, if in your presence,

he was advised what the objection --

A. It was never his intention to warranty a portion of both of them, Mr. Tanner advised me it was an error. He had offered to give him whatever interest he had. I didn't inspect it, and requested that he prepare a quitclaim for 1A and 2A, which he did.

As I recall, I asked him to sign those two at the time of release. I think that is about the last time we had conversations regarding these documents. I believe Mr. Cocke filed notice of cancellation. I don't think anything was signed or asked to be signed.

Q. On March 5, when you handed him the Deed, are you saying you are not sure you handed him the Deed to 1A and 2A?

A. I believe it was quitclaim.

Q. At any time, did you hand him the Warranty Deed to Parcels 1A and 2A?

A. I believe I gave it back to Mr. Tanner, when he refused to sign.

Q. You think this was prior to March 5?

A. I am a little hazy on that.

Q. This could be March 5th, when you presented this to Mr. Cocke, possibly?

A. Probably or possibly.

Q. You are saying it is possible, not probable, that you handed this to Mr. Cocke

on March 5? You didn't hand him the Deed to Parcel 1, 1A, 2 and 2A?

A. Right.

Q. When you did hand, whatever date it was, you handed Mr. Cocke a Deed for Parcels 1A and 2A. Did you, at that time, make copies of that for Mr. Cocke to take with him?

A. I very well possibly could have. I made copies of various documents Mr. Cocke asked me to make for him.

Q. Did you ever, at any time, then, present an amended Deed or new Deed to just parcels 1 and parcels 2, to Mr. Cocke?

A. Yes.

Q. When would this have been?

A. As I recall, that was the last time I had asked him to sign anything, which would probably be on the 5th of March.

Q. Was there already in escrow his Deed for Parcels 2, and his half interest in 1?

A. Yes. He had prepared a Deed, or somebody prepared a Deed, that he signed.

Q. Do you recall when that was received by you, or Transamerica Title Company?

A. I would say, probably before the first of the year, '69; right around that time.

Q. Did Transamerica have any objection to Francis Cocke's Deed to his half interest in Parcel 1?

A. Yes. We felt Parcel 1, was alright, but Parcel 2, I think there was a little triangle down there in the southwest corner.

The engineer prepared the map and description, and did not feel we could insure.

Q. Parcel number 1, didn't the land go to the water's edge?

A. I may be confused. There is one that went down to the ditch, the one where he and his wife, both, had an interest, I imagine.

Q. Parcel 1 was alright?

A. One Deed was okay, and - the one he and his wife had an interest in the property was alright. The other parcel, we felt was insufficient.

Q. The reason you felt it was insufficient was because of the small triangle?

A. Yes.

Q. Everything except the little triangle was alright?

A. That is what I was given to understand.

Q. Was this objection to this triangle based on the objection by Mr. Wagoner, of the Title Company?

A. Yes.

Q. I think you stated, Mr. Cocke did not sign the Warranty Deed?

A. He did not sign that one, but he signed another.

Q. Did he on the 5th of March execute effective notice of cancellation?

A. He did.

Q. Do you have a copy of that in your files?

A. I do.

Q. Is this it? May we look at it?

A. (Handed copy to Mr. Riggs)

Q. Did you notify the Buyer by telephone of the cancellation?

A. No, I don't believe so. Mr. Tanner called saying that he had received it - or maybe he called saying he was sending in the Mortgage and funds due. I am a little hazy.

I do know I did talk to Mr. Tanner regarding this, but I can't recall whether or not it was mentioned in the conversation. I don't believe I made a specific call to Mr. Tanner that it was being sent. I believe, I advised him only as a matter of conversation.

Q. I see. At one time you did call him about the Deed to Parcels 1A and 2A?

A. Yes, I believe I called him in Mr. Cocke's presence. That is when he refused to sign the Deed, because it required a Warranty Deed on 1A and 2A.

Mr. Tanner was very apologetic. He said it was never his intention, strictly a lack of communication between him and his secretary. He didn't check it over as closely as he should have.

Q. At the time you talked to him, you remember you talked to him about this cancellation time; you talked to him about 1A and 2A?

A. As I recall, it was different -- seems to me 1A and 2A, came up prior to the 5th of March. As I said, I am hazy.

Q. I want to draw your attention to this letter. Was that written when you talked about, a while ago, the letter sent to you of March 5, sent to your attention, regarding this escrow 02013111-7, written by Maurine D. Horne and also Mr. Seth Horne; which in paragraph 2, - I want for the purpose of the record, I wonder if you would read paragraph 2 on the first page.

A. 'Releases have been provided for all acreage, except Parcels 1A and 2A, which we understand are to be Deeded to Buyer, at the close of escrow. Parcels release properly executed by Francis M. Cocke and Joan Cocke, are to be held by Title Company and released to Buyer as payments are made to the First National Bank of Arizona.

Enclosed you will find Buyer's checks, each in the sum of $32,000, made

payable to First National Bank of Arizona in conformity with the agreement between Mr. and Mrs. Cocke.

You are authorized to deliver these sums to the First National Bank, when you have accomplished the following ...'

Q. There are several requirements on the page--

A. 'Have record Deed and Mortgage, which Deed is to include a Deed to Parcels 1A and 2A, to the Buyers.

Q. It appears they were requiring these Deeds to Parcels 1A and 2A, doesn't it?

A. It appears that way.

Q. Yet, escrow didn't call for Deeds to Parcels 1A and 2A?

A. That is right.

Q. What would be your thoughts regarding that paradox?

MR. GILLENWATER: I object to the question. It is unintelligible. I am going to instruct him not to answer.

MR. RIGGS: Your Attorney has instructed you not to answer. He has objected for the record. Under instruction, you don't have to answer, at this time. You realize, we can file a petition with the Court to make an order for the production of this type of answer.

Do you still take your Attorney's advise not to answer?

A. That is what we are paying him for.

MR. GILLENWATER: Let the record show you are at liberty to rephrase the question.

MR. RIGGS: I will rephrase the question.

Q. (By Mr. Riggs) According to escrow instructions, I believe you previously stated, the escrow instructions only called for a Warranty Deed and delivery of Parcels 1 and 2, by Mr. Cocke?

A. Yes.

Q. Yet, in this letter written - requirement number 4, states, that they asked you to have record Deed, Mortgage, which Deed is to include Deed for Parcels 1A and 2A, to the Buyers.

A. Yes.

Q. Is that not different than the escrow instructions?

A. That is right.

Q. It is not in accordance with the escrow instructions?

A. That is right.

MR. GILLENWATER: I will object to the form of the question.

Q. This language would also back up Warranty Deed delivered to you, which includes Parcels 1A and 2A?

A. I don't understand.

Q. Requirement number 4, have record Deed and Mortgage, which Deed is to include Deed to Parcels 1A and 2A, to the Buyer. That was to back up enforcement of Warranty Deed they sent to you, which you showed to Mr. Cocke, which applied to Parcels 1A and 2A. Would that be correct?

A. 1A and 2A was quitclaim. It never was a part of the escrow agreement; made between them outside. If the property came down to the fact all terms were complied with, and Mr. Cocke refused to sign quitclaim Deed, I believe, I would probably have closed escrow without 1A and 2A.

Q. Did you send Mr. Cocke a copy of the March 5 letter you received from Mr. and Mrs. Horne?

A. I did.

Q. When did you send that to them?

A. I sent it on March 10th.

Q. May we see that letter of March 10?

A. My copy.

Q. Do you feel that in writing in the requirement in number 4, in the Buyer's letter, where they are putting on extra conditions to that escrow, do you feel they have complied with the escrow; that actually they were making a counteroffer?

MR. GILLENWATER: I object to the form of the question; calls for a legal conclusion of this witness.

You may go ahead and answer.

WITNESS: He is objecting.

MR. RIGGS: He has objected to the form of the question. That is a proper objection. You may answer.

WITNESS: Well, I felt and I still feel, in essence, the Buyer had done everything that he possibly could to close the escrow.

Prior conversations with Mr. Cocke, he had voluntarily offered them this Parcel 1A and 2A. As I said, I couldn't insure Title. He probably had Title by adverse position, and the engineer, who made the description out, merely threw that in. It was never a part of the considered sale price. It was based on the netable acres, and if you want to give it to him, fine and dandy.

As far as I was concerned, it was never a part of escrow, despite what Mr. and Mrs. Horne said.

If I had been in a position to close I would have asked for clarification. Mr. Cocke had refused to sign quitclaim Deed. I would have closed on that basis. I would have closed the escrow.

Q. In the letter to Mr. Cocke there, of March 15, you mention checks and documents?

A. Yes.

Q. I notice there are 3 Promissory Notes here, one in the amount of $265,587.21; and $77,308.93, and a third, $77,308.93; but the Notes are not complete on the face. They don't evidence dates. What would be

the reason for that?

A. That, I don't know.

Q. Is it customary for them to send you the Notes and you want to insert the date when it --

A. Probably the Note is dated, and the Mortgage dated, and in as much as it was only March 5, I probably inserted the 5th of March on those Notes.

Q. Also the body of the Note, I mentioned, wasn't filled out, where it said insert date of payment.

A. According to escrow instructions I had, I would insert those dates. Interest was to start from date of closing of escrow.

Q. Those checks were dated March 7, is that correct?

A. Yes.

Q. Subsequent to this time, other than March 31, and April 1, did you write certain letters to Mr. Cocke?

A. I recall a letter. What do you have in mind?

Q. In those letters, March 31, you suggest a certain meeting for 2:00 o'clock, Wednesday, April 2, in your office to resell the impairment impasse, is that correct?

A. Yes.

Q. Did a meeting ever occur?

A. It did.

Q. Was Mr. Cocke there?

A. He was not.

Q. Who was present, at the time?

A. Mr. Tanner, Mr. Howard, Mrs. Whitney, and Mr. Horne. I believe they were the only ones that were present.

Q. Can you tell me, best you recall, what happened at that meeting?

A. It was sort of one-sided, I believe. As far as I was concerned, nothing was accomplished.

Q. You don't care to elaborate any further?

A. No.

Q. Did you write any other letter to Mr. Cocke, during the 13 day period?

A. I don't recall.

Q. Would you mind just looking to see, if you had written him a letter during the 13 day period?

A. I don't find a copy of such letter in the file. Do you have a copy that you want to make reference to?

Q. No. Did you receive any further instructions during the 13 day period, either from Mr. Cocke, or the Hornes?

A. No. Mr. Cocke came in at one time,

I think. This time, he was bringing witnesses, and said, as far as he was concerned, - he asked for the documents back, and I refused to give them to him.

I told him, I felt the escrow had not been cancelled. He said, as far as he was concerned, it had been. That was the gist of the conversation.

Q. No specific instructions?

A. No. I think he wanted copies of various documents, that I had.

Q. When Mr. Cocke came in to you with witnesses, did a Mr. Daniel come with Mr. Cocke?

A. There was a gentleman with him, I recall.

Q. Wasn't this after the 13 day period?

A. Yes. I think he came and talked to my secretary, asked her for documents. She refused to give them to him.

Q. He did make a written and oral request for papers to be returned to him?

A. He may very well have.

Q. On, or about, April 3, 1969?

A. Yes.

Q. At that time, did you then refuse to deliver the papers and sign your name?

A. Yes. I made copies of them, xerox copies of the letter.

Q. I show you a xerox copy, is that your signature on the refusal?

A. That is right.

Q. I wonder if you would read for the record, with reference to the escrow instructions again, Numbers 16 and 25?

A. CANCELLATION: If either party elects to cancel these instructions because of the failure of the other party to comply with any of the items hereof within the time limits provided herein, said party so electing to cancel shall deliver to escrow agent a written notice to the other party, and escrow agent demanding that said other party comply with the terms hereof within 13 days from the receipt of said notice by escrow agent, and that these instructions shall thereupon become cancelled.

Q. In number 16, the word there - with any of the items - that would be "terms"?

A. Yes.

Q. Would you read that other number 25, please?

A. "Not withstanding any of the provisions herein, escrow agent is hereby instructed that any payment of money due under a cancellation notice shall be accepted, unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as payment in these circumstances, unless provided by the party seeking cancellation, or approved---".

Q. Those checks you received, are those personal checks?

A. They are.

Q. They are not certified or cashier's checks?

A. They are not.

Q. They are not money orders?

A. They are not.

Q. I believe you stated before, at one time, you notified Mr. Cocke the triangle was unissued regular Title under provisions of number 2, because of the triangle?

A. That is right.

Q. Would you read escrow instructions numbers 24, 18, and 22?

A. "In the event said other party shall fail within said 13 day period to comply with all terms hereof, these instructions shall become cancelled and the escrow agent ..."

22 - "Failure to return all documents deposited hereunder to the party who delivered the same, except documents executed by both Seller and Buyer; shall be marked 'cancelled' and retained in the files of escrow agent."

Q. 24?

A. "If escrow agent is unable or unwilling to comply with these instructions for any reason, other than cancellation as hereinbefore provided, and if Transamerica Title Company is unwilling to issue any Title Insurance Policy provided for herein, escrow agent is directed to pay the charges

payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charge payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, all documents executed by one party only on deposit with escrow agent shall be returned to the parties who executed said documents, mutually executed instruments shall be retained by escrow agent".

Q. Did Mr. Cocke have any money on deposit in escrow?

A. Mr. Cocke, no.

Q. I believe you said some notes and Mortgage referring to a balance on Parcel 1, is that correct?

A. Yes.

Q. Who were they made out in favor of?

A. Parcel 1, I believe was owned jointly by Mr. and Mrs. Cocke.

Q. Who were those Notes made payable to?

A. Payable to them, also.

Q. Mr. and Mrs. Cocke -- maybe I got the parcels mixed up. This is one Note here for $77,308.93, appears to be made out solely to Joan Cocke. What is the reason for that?

A. That is in compliance with escrow instructions.

Q. Isn't the Title Trust portion of deferred balance?

A. According to instructions, as I recall, Mortgagor is Francis and Joan Cocke, and on one, the Mortgagee is Francis Cocke.

Q. In your opinion, do you think the instructions from the Trustee modified that?

MR. GILLENWATER: I object to the form of the question, calls for a legal conclusion.

MR. RIGGS: You can go ahead and answer.

A. Of course what the Trustee says -- I can't see how I can keep modifications from a third party. I have trouble enough with two parties. I would say, "No", in my opinion.

MR. RIGGS: I have nothing further.

CROSS EXAMINATION

BY MR. TANNER:

Q. The two checks that were referred to in the letter, included Notes and Mortgage, each in the sum of $32,000, were Notes and checks due under escrow instructions?

A. No.

Q. This was an annual payment that was to come due afterwards?

A. Yes.

Q. When Mr. Cocke saw the Warranty

Deed, which had been prepared by you, that included Parcels 1A and 2A, and objected to signing it; it is the truth, isn't it, that he stated at that time, he would agree to give a quitclaim Deed but not a Warranty Deed?

A. Yes.

Q. And in conformity, you did call me immediately regarding that?

A. Yes.

Q. And I immediately delivered to you a quitclaim and Warranty Deed?

A. As I recall, that is correct.

Q. Did Mr. Cocke ever prepare a Promissory Note and Mortgage for submittal for Mr. and Mrs. Horne, which he requested to be signed by them?

A. Not to my knowledge.

Q. Did he prepare any documents that were to be signed by Mr. and Mrs. Horne?

A. He did not.

Q. Were you present when he had any conversation with me, or anyone else, concerning preparation of these documents?

A. I could have been; I don't recall the gist of the conversation.

Q. Do you recall having conversations with me regarding what form these documents should be in?

A. Yes.

Q. On several occasions?

A. Yes.

Q. And my request for you to try to obtain some type of instructions from Mr. and Mrs. Cocke, so we could prepare the forms?

A. Yes.

Q. Do you recall ever having conversation regarding what form these documents should be in, who payable to, etc.?

A. Yes.

Q. And who the Notes and Mortgages were to be made payable to, who checks were to be made payable to?

A. Right. You did the only thing -- I can tell you what escrow instructions states, that is what you did.

Q. If we were going to submit documents without instructions, we would have to agree, is that correct?

A. That is right.

MR. TANNER: No further questions.

CROSS EXAMINATION

BY MRS. WHITNEY:

Q. Mr. Kavanaugh, did Joan Cocke Execute the release required of her and deliver to escrow?

A. Yes.

Q. Did she execute quitclaim Deed to Parcel 1A?

A. She did.

Q. Excepting, then, for a mutual agreement with Mr. Cocke, if such could be obtained, she had performed everything that was required of her in this escrow?

A. In my opinion.

Q. Did Mr. Cocke ever prepare some instructions for his signature, concerning distribution of the funds?

A. I believe he did.

Q. Do you have a copy of that?

A. (Searching files)

Q. Would it help, if I gave you the copy I have?

A. Yes.

Q. (Copy handed to witness)

Is this the document which Mr. Cocke signed, entitled 'Escrow Instructions', to escrow agent by Joan H. Cocke and Francis M. Cocke?

A. Yes.

Q. Except for the red line?

A. Yes.

Q. It is dated January 21, 1969, is that correct?

A. It is.

Q. Do you remember discussing this document with him?

A. Yes.

Q. Do you recall that I advised you that the figure set forth on the second part entitled, 'Agreement or Distribution of Funds' was correct as to the amount and percentage?

A. Yes.

Q. It was not correct with respect to the fact Mr. Cocke prepared it for Mrs. Cocke's money to be paid to Joan H. Cocke and to him, jointly?

A. I remember.

Q. Do you further recall that I contacted the First National Bank and so advised them; do you recall my letter of February 26, and do you have the original, which was signed by Joan H. Cocke?

A. I believe I do; yes, I have.

Q. Do you also remember that a copy of this letter was sent to the First National Bank as shown at the bottom of the letter on page 3?

A. Yes.

Q. This was at the Tempe Branch of the Bank. It was sent to the attention of Mr. Brown?

A. Yes, you sent it to the attention of Mr. Brown.

Q. Do you have a copy of Mr. Brown's letter dated March 3, 1969, in which he advised me that in view of the instructions, the First National Bank would be third party only in the duty of normal collection, as should be the transaction of the Title Company?

A. I recall the letter. I don't seem to have a copy.

Q. That copy was sent to you?

A. Yes. I don't recall--

Q. You recall the contents of the letter?

A. Yes.

Q. As a result of this letter, would you say, therefore, you were unable to determine in your escrow, to whom to pay the money and in what amount?

A. That is right.

MRS. WHITNEY: I believe that is all.

CROSS EXAMINATION

BY MR. GILLENWATER:

Q. Mr. Kavanaugh, as I understand it, you got a Trustee Deed from First National Bank?

A. Yes.

Q. Delivered to you --

A. Yes.

Q. Authorizing you to use the Deed, when you received further instructions from Mr. and Mrs. Cocke?

A. That is right.

Q. Were there ever any further instructions received by you, that were agreed upon by Mr. and Mrs. Cocke?

A. No.

Q. Was that what held up the closing of escrow?

A. Ninety-nine and nine-tenths per cent.

Q. Were you able then, to use the Deed from the First National Bank to close escrow prior to receiving those instructions?

A. No.

Q. So, regardless of how the check had been made, would have been made, could have been made, you still could not have closed escrow, until you received subsequent collections from Mr. Cocke?

A. That is right.

Q. And no further instructions were received?

A. No.

Q. I take it, that Mr. Cocke had, did

request one 13 day Notice in December?

A. Yes.

Q. His objection at that time, was cured?

A. Yes.

Q. Then, he required a second 13 day Notice. What was his reason for requesting that?

A. He told me he was tired of being jockeyed around, and he would serve another Notice.

Q. Did those Notes and letter from Mr. Tanner, and Mortgage, cross in the mail?

A. Yes, I believe they did.

Q. Were the Buyers having difficulty in determining from Mr. and Mrs. Cocke, how the Documents, Notes and Mortgage and Check should have been delivered?

A. I would think they had.

Q. Did they indicate that to you in the letter?

A. Yes.

Q. To your own personal knowledge, were the Buyers ready, willing and able to close this escrow, before the 13 day Notice and afterward, and during the 13 day Notice?

A. As far as I know, they still are.

MR. GILLENWATER: I have nothing further.

REDIRECT EXAMINATION

BY MR. RIGGS:

Q. Did you receive specific instructions to make the check directly payable to Mrs. Cocke?

A. I did not.

Q. Could it have been just as easy to make the check jointly to Mr. and Mrs. Cocke, and then let them fight out their differences?

A. I had instructions from the Bank. It was pretty specific. I was to get mutual instructions from them as to how the disbursement of funds was to be handled. It was never forthcoming. Is that what you have reference to?

Q. In the light and on the face of that, still the check was made out directly to her?

A. No. All checks were made payable to First National Bank of Arizona, Tempe, for the account for Joan Cocke.

Q. That wouldn't have required Francis M. Cocke's endorsement?

A. No.

Q. Although made to the Bank for her benefit, nothing was accrued to him?

A. He had a check made to him for the same, or greater amount - no, same amount.

Q. Was the Tempe Bank Trustee?

A. They were to be set up as collection agent, as Mr. Cocke's agent. He didn't want us to get our hands on his money.

MR. RIGGS: I don't have any further questions.

RECROSS EXAMINATION

BY MRS. WHITNEY:

Q. Do you recall what date Joan Cocke signed the release?

A. February 27.

Q. February 27th, the same date as that letter.

MR. GILLENWATER: What is the date?

MRS. WHITNEY: February 27.

Q. (By Mrs. Whitney) Mr. Kavanaugh, go back to the letter of instruction from the Bank, that came with the Deed. Will you read that particular paragraph, if you can find it again?

A. And in accordance with further instructions governing distribution of proceeds of sale, to be forwarded to your company by Joan H. Cocke and Francis M. Cocke.

Q. Doesn't say mutual or jointly?

A. Right.

Q. Did Joan Cocke, through me, give you instructions with reference to distribution of funds to her?

A. She did.

MRS. WHITNEY: That is all, thank you.

MR. RIGGS: It appears that Joan H. Cocke was notified some time before February 27, on that date she was notified, why wasn't Mr. Cocke notified until March 5th?

WITNESS: I don't recall.

MR. RIGGS: Thank you very much.

(Thereupon, at 11:40 o'clock, the deposition was concluded)

- - - - - - - - - - - - -

County of [illegible] A [illegible] that the within instrument was duly recorded

In DOCKET and indexed in deeds

at the request of

When recorded, mail to:

Witness my hand and official seal.

, County Recorder,

By Deputy Recorder

Fee No.

Compared
Photostated
Fee:

WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations, Parcel 1

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

An undivided one-half (½) interest in 49.5023 acres of land within the limits of the City of Tempe described as folows:

(PARCEL NO. 1) That part of the East half (E½) of the Southeast quarter (SE¼) of Section twenty (20), Township one (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the East line of said E½ SE¼ of Section 20, where said East line intersects the middle of the George Ditch, which bears S.0°20'17"E. 323.50 feet from the Northeast corner of said E½ SE¼ of Section 20; thence S. 0°20'17"E. 1806.47 feet along the East line of said E½ SE¼ of Section 20 to the North bank of the Jenkins Ditch; thence N.88°40'37"W. 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said E½ SE¼ of Section 20; thence N.0°07'25"W. 1381.50 feet along the West line of said E½ SE¼ of Section 20 to the middle of the George Ditch; thence N.68°31' 41"E. 399.54 feet along the middle of the George Ditch; thence N.67°40'43"E. 211.50 feet along the middle of the George Ditch; thence N.76°59'43"E. 375.20 feet along the middle of the George Ditch; thence N.80°57'10"E. 195.15 feet along the middle of the George Ditch; thence N.75°14'43"E. 206.00 feet along the middle of the George Ditch to the point of beginning, subject to existing rights of way and easements for roads, ditches and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the title against all persons whomsoever.

Dated this 30 day of December, 1969

Francis M. Cooke

STATE OF Arizona
County of Maricopa } ss.

This instrument was acknowledged before me this 30 day of December, 1969, by

Notary Public

My commission will expire

STATE OF
County of } ss.

This instrument was acknowledged before me this day of , 19 , by

Notary Public

My commission will expire

Exhibit D-one

FURNISHED THROUGH THE COURTESY OF TRANSAMERICA TITLE INSURANCE COMPANY

272

BEST COPY AVAILABLE

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, an account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated_____, recorded_____in Docket_____, page_____.

BEST COPY AVAILABLE

County of [illegible] In DOCKET and indexed in deeds

Fee No.

at the request of

When recorded, mail to:

Witness my hand and official seal.

, County Recorder,

By Deputy Recorder

Compared
Photostated
Fees

WARRANTY DEED

Parcel 2

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit

(PARCEL NO.2), That part of the Southeast quarter (SE¼) of Section Twenty (20), Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the North line of said SE¼ of Section 20 which bears S.89°43'55"W. 528.00 feet from the Northeast corner of said SE¼ of Section 20; thence S.0°20'41"E. 435.44 feet to the middle of the George Ditch; thence S.76°59'43"W. 236.29 feet along the middle of the George Ditch; thence S.67°40'43"W. 211.50 feet along the middle of the George Ditch; thence S.69°31'41"W. 399.54 feet along the middle of the George Ditch to a point on the West line of the E½ SE¼ of said Section 20; thence S.0°07'25"E. 1381.50 feet along the West line of the E½ SE¼ of said Section 20 to a point on the North bank of the Jenkins Ditch; thence N.88°40'37"W. 463.68 feet along the North bank of the Jenkins Ditch; thence N.89°08'43"W. 481.97 feet along the North bank of the Jenkins Ditch; thence N.0°51'17"E. 9.00 feet; thence N.56°56'50"W. 328.73 feet; thence N.34°59'16"W. 150.00 feet; thence S.89°54'35"W. 25.00 feet to a point on the West line of said SE¼ of Section 20; thence N.0°05'25"E. 1757.73 feet along the West line of said SE¼ of Section 20 to the Northwest corner of said SE¼ of Section 20; thence N.89°43'55"E. 2121.23 feet along the North line of said SE¼ of Section 20 to point of beginning, containing 72.3284 acres within the limits of the City of Tempe and subject to existing rights of way and easements for roads, ditches, and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the title against all persons whomsoever.

Dated this 30 day of December 1968

Francis M. Locke

STATE OF Arizona
County of Maricopa

This instrument was acknowledged before me this 30 day of December, 1968 by

Mrs Cecil J. Bastow

My Commission Expires 12/12/69 Notary Public

My commission will expire

STATE OF [illegible]
County of [illegible]

This instrument was acknowledged before me this [illegible] day of [illegible], 19[illegible], by

[illegible]

Notary Public

My commission will expire

Exhibit D-One

FURNISHED THROUGH THE COURTESY OF TRANSAMERICA TITLE INSURANCE COMPANY

BEST COPY AVAILABLE

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, on account of land in Agricultural Improvement District No. 2 and Drainage District No.2.

5. Controlled right of access to Interstate Highway referred to in Civil No. 183278; Lis Pendens recorded in Docket 5874, page 566.

6. Mortgage executed by Francis M. Cocke to The Federal Land Bank of Berkeley to secure an indebtedness of $_____, and other amounts payable thereunder, recorded April 14, 1966 in Docket 6004, page 97, which Francis M. Cocke has agreed to pay.

7. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated_____, recorded_____in Docket_____, page_____.

BEST COPY AVAILABLE

When recorded, mail to:

[illegible]

For use by County Recorder

PARTIAL RELEASE OF MORTGAGE

For a valuable consideration FRANCIS M. COCKE, a divorced man

does hereby release from the lien of that certain mortgage executed

by M. S. HORNE

to FRANCIS M. COCKE

recorded in Docket , page , records of County, Arizona, the following described property:

Copy - Not for Record

That certain parcel of land referred to as Parcel 2A, beginning at the center of Section 20, Township 1 North, Range 4 East;

Thence South 0° 05' 25" West 425.963 feet;
Thence North 89° 43' 55" East 512.109 feet;
Thence North 0° 07' 25" West 425.963 feet;
Thence South 89° 43' 55" West 510.515 feet to the true point of beginning; containing 5.0 acres, more or less.

This release does not affect in any way the balance of the property described in said mortgage, but releases only the above described property.

Dated this day of , 19

Francis M. Cocke
Francis M. Cocke

STATE OF ARIZONA)
) ss.
County of Maricopa)

This instrument was acknowledged before me this 5 day of March 1969 by Francis M. Cocke.

Henry Kuranaga
Notary Public

My commission will expire: 4/13/69

Form 12 Rev. 5/59

276

BEST COPY AVAILABLE

When recorded, mail to:

FRANCIS HARVIS & GIVENS
ATTORNEYS AT LAW
[illegible] W. G. BUILDING
[illegible] AVENUE
[illegible]

For use by County Recorder

PARTIAL RELEASE OF MORTGAGE

For a valuable consideration FRANCIS M. COCKE, a divorced man

does hereby release from the lien of that certain mortgage executed

by M. S. HORNE

to FRANCIS M. COCKE

recorded in Docket , page , records of County, Arizona, the following described property:

That certain pracel of land referred to as Parcel 2Q, beginning at the center of Section [illegible], Township 1 North, Range 4 East; thence North 89° 43' 55" East 928.565 feet; thence South 0° 07' 25" East 520.99 feet; thence North 89° 43' 55" East 22 feet; thence South 0° 07' 25" East 1041.98 feet to the true point of beginning:

Thence South 0° 07' 25" East 518.37 feet;
Thence South 88° 40' 37" East 418.20 feet;
Thence North 0° 07' 25" West 529.98 feet;
Thence South 89° 43' 55" West 418.05 feet
to the true point of beginning; containing
4.96 acres, more or less.

Copy Not for

This release does not effect in any way the balance of the property described in said mortgage, but releases only the above described property.

Dated this day of , 19

Francis M. Cocke
Francis M. Cocke.

STATE OF ARIZONA)
) ss.
County of Maricopa)

This instrument was acknowledged before me this 5 day of March 1969 by Francis M. Cocke.

Henry Kennedy
Notary Public

My commission will expire: 4/13/69

Form [illegible]-2 Rev. 5/59

277

BEST COPY AVAILABLE

...d, mail to:

...VENS
...
...
...
...

For use by County Recorder

PARTIAL RELEASE OF MORTGAGE

For ... ...ble consideration FRANCIS M. COCKE, a divorced man, as to
an ... ...ded one-half interest

... release from the lien of that certain mortgage executed

... HORNE

... ...S M. COCKE

... ...Docket ..., page ..., records of ... County, Arizona
...ng described property:

That certain parcel of land referred to as Parcel
..., beginning at the Southeast corner of Section
20, Township 1 North, Range 4 East, thence North
0° 20' 17" West 516.96 feet to the true point of
beginning:

Thence North 0° 20' 17" West 490.255 feet;
Thence North 88° 40' 37" West 444.326 feet;
Thence South 0° 20' 17" East 490.255 feet;
Thence South 88° 40' 37" East 444.326 feet
to the true point of beginning; containing
5.0 acres, more or less.

Copy — Not for use

This release does not affect in any way the balance of the property described in said mort... but releases only the above described property.

Dated this ... day of ..., 19

Francis M. Cocke
Francis M. Cocke

...TE OF ARIZONA)
) ss.
...nty of Maricopa)

This instrument was acknowledged before me this 5 day of March 1969
... Francis M. Cocke

Henry Farnsworth
Notary Public

...sion will expire: 4/13/69

...-72 Rev. 5/59

BEST COPY AVAILABLE

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	No. C-222472 F. M. COCKE'S MOTION TO VACATE ORDER STRIKING HIS AMENDED COUNTER-CLAIM AGAINST PLAINTIFFS

Filed: September 9, 1971.

* * * * *

* * *Since that [the Arizona] constitution adopts the Federal Constitution as the supreme law of the land, it is of course clear that this court is completely without the power, or jurisdiction, to

deprive a person of the rights or immunities granted by the Federal Constitution. One of these is the right to enforce contract obligations, without impairment by the judicial department.

* * * * *

It cannot be denied that the rights to enforcement of contract obligations is a property right, nor that under the 14th Amendment property rights are civil rights protected by the United States civil and criminal code against invasion by person acting under color of state law. Monroe v. Pape, 306 U.S. 167, 81 S.Ct. 473, 5 L.ed.2d 492.

* * * * *

Supreme Court, U. S.
F I L E D
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

RICHARD L. THOMPSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004
(602) 254-7331

Counsel for Petitioner

VOLUME IV

Pages 281 - 394

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 F. M. COCKE'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW Filed: January 17, 1972

As provided by 16 ARS Rule of Procedure 52(a), defendant Francis M. Cocke hereby requests that the Court find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment, all in writing, on the answers to the questions set forth below, such answers being necessary to the proper determination of the period of time during which the damages claimed by plaintiff Buyers, for delay in their planned development claimed by

Buyers to have been wholly caused by F. M. Cocke, could have accrued.

1. As a matter of fact and law, whether the Minute Order of 9-23-71 constituted approval of plaintiff Buyers' proposed Amendment to their original Complaint attached to their Motion for Leave To Amend, filed August 11, 1971 which proposed Amendment incorporated by reference paragraphs I through VII and also the demand for judgment contained in the original Complaint, and in addition sought punitive damages from both defendants on an allegation of constructive fraud.

2. Inasmuch as Buyers in their original Complaint demanded judgment:

> 6. For reasonable damages for the failure of Defendants to close said Escrow as agreed and to convey said real property to M. Seth Horne and Maurine D. Horne, (emphasis added)

a. As a matter of fact and law, whether defendants can be compelled to instruct the trustee Bank to deliver into escrow its deed conveying the trust half-interest in Parcel 1 to M. Seth Horne and Maurine D. Horne, where the Bank's deed to such half-interest to James Stewart Company was delivered and accepted into escrow in October, 1968, without objection by Buyers or escrow agent, long before the purported nomination of the Hornes, and in view of the delivery into escrow by Buyers of an unsigned warranty deed to half-interest in Parcel 1 for signing by James Stewart Company during March, 1969, so ratifying the acceptance of the deed to the Company.

b. As a matter of fact and law, whether defendant F. M. Cocke can be compelled to deliver into escrow his deed conveying his half-interest in Parcel 1 to the Hornes, where his warranty deed conveying such half-interest to James Stewart Company was delivered and accepted into escrow in January, 1969 (Kavanaugh Deposition, page 21, line 14, to page 23, line 1), without objection by Buyers or escrow agent, long before he was notified of the purported nomination, and in view of the delivery into escrow by Buyers of the unsigned warranty deed from James Stewart Company mentioned in "a" just above;

c. As a matter of fact and law, and as affecting the claimed delay, whether F. M. Cocke was under any duty to recognize the purported nomination of the Hornes unless and until the $40,000 note and mortgage made out in favor of and held by James Stewart Company, or the extra $20,000 represented by such note and mortgage, was delivered into escrow, in view of the well settled rule that where a party to a contract is himself in default, he cannot compel performance by another party.

3. In paragraph 1 of Buyers' demand for judgment, Buyers demand that the escrow be ordered closed, and also demand that defendants, purportedly to end the claimed delay, cause Tranamerica to issue its title insurance policies to the Hornes (not to James Stewart Company), all in accordance with the agreement and escrow instructions.

a. In connection with Buyers' demand that the escrow be ordered closed,

as a matter of fact and law and as material to Buyers' claim of delay by F. M. Cocke, whether the closing of the escrow by cancellation in accordance with the escrow instructions, if so closed, constituted closing in accordance with the consolidated agreement and escrow instructions, as demanded by Buyers, in view of the well settled rule that where a contract contains provisions for its cancellation, the contract controls. 17 Am Jur 2d 969, Contracts Section 495.

b. Since Buyers have here admitted that it is the duty of the escrow agent, not the defendants, to close the escrow, and so deliver the deeds and title policies to Buyers, as a matter of fact and law whether Buyers' remedy for delay claimed to be caused by F. M. Cocke was an action against the escrow agent, in which Sellers could be properly joined, not an action against Sellers, in view of the well settled rule to that effect stated in 28 Am Jur 2d 51, Escrow, Section 39, and in 30A CJS 1014, Escrows, Sections 15, 16.

c. As far as the title insurance policies are concerned, in connection with the claimed delay by F. M. Cocke, as a matter of law whether paragraph 24 leaves it entirely up to Transamerica, not to the defendants, whether or not it will issue such policies.

d. As a matter of fact and law, affecting the delay claimed to be caused wholly by F. M. Cocke, whether Transamerica's objection (Kavanaugh Deposition, p. 22) to the inclusion of the small triangle in F. M. Cocke's deed to Parcel 2, delivered into escrow in January, 1969,

on Transamerica's claim that F. M. Cocke's title to the triangle was divested by a neighbor's quit-claim deed to the State, was a valid objection, where the neighbor neither had nor asserted (McCarthy Deposition, pp. 23-26) any claim thereto, and where the State claimed no right thereto based on such quit-claim (Court Records, Condemnation Case No. 183278).

e. As a matter of fact and law, whether Transamerica's unwillingness to issue its title policy on Parcel 2 as described in F. M. Cocke's deed to James Stewart Company (alleged and so admitted by Buyers in paragraph V of their Answer to F. M. Cocke's original Counterclaim) (see also Kavanaugh Deposition, page 7, line 24, and page 22) cancelled the escrow, instead of delaying close of same as desired by Buyers, under the mandatory and self-executing provisions of the fine print instruction paragraph 24, in view of the well settled rule that where a contract contains provisions for its cancellation, the contract controls. 17 Am Jur 2d 969, Contracts, Section 495.

4. On February 27, 1970, Transamerica asserted that it was at that time unable or unwilling to follow the Horne's escrow instructions, contained in their letter dated March 5, 1969, directing close of the escrow with payment of the trust land proceeds to Joan H. Cocke contrary to the trustee Bank's instructions (Kavanaugh Deposition, examination by escrow agent's attorney, page 42, line 16, through page 44, line 22), so reversing, despite trial and appellate court rulings that Joan H. Cocke was entitled to the trust land proceeds, the position taken by the escrow agent in the escrow

officer's letter of March 10, 1969 stating that Buyer had done everything required of him to close the escrow.

In view of this reversal of position by the escrow agent, and inasmuch as neither the Buyers in making their claim for damages suffered by reason of claimed delay by F. M. Cocke in the closing of the escrow, nor the Court in its Minute Order of December 8, 1970 granting Buyers' Motion for Summary Judgment, have specified the particular date which marked the beginning of the time period of such claimed delay:

a. As a matter of fact and law whether Buyers are entitled to damages from F. M. Cocke for the period March 5, 1969 through February 27, 1970 on Buyers' contention that they were in full compliance throughout this period with respect to:

(1) Buyers' check, note and mortgage enclosed in the Horne letter purportedly representing the balance due on the trust land but all made out in favor of Joan H. Cocke;

(2) Buyers' note and mortgage purportedly representing the balance due on the trust half-interest in Parcel 1 but which were $32,000 deficient, since the Hornes' letter demanded recording of the deeds and mortgages BEFORE payment of the $32,000 due January 2, 1969;

(3) Buyers' note and mortgage purportedly representing the balance due on F. M. Cocke's half-interest in Parcel 1 but which were $32,000 deficient, since the Hornes' letter demanded recording of

the deeds and mortgages BEFORE payment of the $32,000 due January 2, 1969.

(4) Buyers' demand in the Horne letter for warranty deeds to Parcels 1A and 2A, not retracted during the period March 5, 1969 through February 27, 1970 (Kavanaugh Deposition, pp. 19, 25-29, 31, 32).

(5) Buyers' failure to deliver into escrow the $40,000 note and mortgage, or substitute funds in the amount of the extra $20,000 represented by same.

b. As a matter of fact and law affecting the claimed delay, whether Buyers' willingness and ability, as claimed in Buyers' Pretrial Memorandum, to comply with the consolidated contract at any time subsequent to the filing of F. M. Cocke's notice of cancellation on March 5, 1969, the same date as on the Horne letter, was or is material to any failure on the part of the Buyers to comply, in view of the well settled rule that there is no doctrine or substantial compliance of escrow agreements, that compliance must be full and to the letter, or else it constitutes merely noncompliance, and that the ability to perform is immaterial. 28 Am Jur 2d 31, Escrow, Section 21; 30A CJS 999, Escrows, Section 10.

c. As a matter of fact and law affecting the claimed delay, whether the escrow was cancelled under instruction paragraphs 16-23, at the end of the 13-day period following F. M. Cocke's filing of his notice of intention to cancel, by non-compliance by Buyers as set forth above under "4a".

d. As a matter of fact and law affecting the claim of delay wholly by F. M. Cocke, whether F. M. Cocke's proposed Agreement on Distribution of Funds, Mortgages, Releases and Commissions, which he executed and delivered into escrow in January, 1969, as proposed joint instructions by F. M. Cocke and Joan H. Cocke as to the disposition of the trust land proceeds, was in accordance with the trustee Bank's instructions to the escrow agent, and in accordance with the letter of instructions of October 10, 1968 to the trustee Bank signed by F. M. Cocke and Joan H. Cocke, and in accordance with their subsequent agreement that Parcel 1 would be valued at $500 per acre above the average price to be received but that the broker's commission on same would be computed at the average price.

e. As a matter of fact and law affecting the claim of delay wholly by F. M. Cocke, whether F. M. Cocke's proposed Agreement on Distribution of Funds, Mortgages, Releases and Commissions was repudiated by Joan H. Cocke by her letter of instructions to the escrow agent dated February 26, 1969, was repudiated by Buyers by their making out in favor of Joan H. Cocke the check, note and mortgage purportedly representing the balance due on the trust half-interest in Parcel 1, and was repudiated by the escrow agent until February 27, 1970 by the escrow officer's letter of March 10, 1969 approving such payment to Joan H. Cocke, and is still repudiated by the escrow agent by the approval in such letter of the recording of the deeds and mortgages BEFORE the payment of the two $32,000 payments, which mortgages reflected the balance due AFTER such payment.

f. As a matter of fact and law affecting Buyers' claim of delay in their proposed development, wholly caused by F. M. Cocke, whether under the consolidated contract the two $32,000 payments were the only payments entitling Buyers to releases, and whether the Hornes' letter of instructions to the escrow agent specified that such payment and therefore the releases, and Buyers' development, must await the delivery into escrow by Sellers of warranty deeds to Parcels 1A and 2A, to which Sellers have never had title, and must await the recording of the deeds and mortgages at a time when such mortgages totalled $64,000 less than the balance due.

Respectfully submitted this
17th day of January, 1972.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

BUYERS' AMENDMENT TO COMPLAINT FOR SPECIFIC PERFORMANCE OF REAL ESTATE CONTRACT AND DAMAGES

Filed: January 27, 1972

For Amendment to the Complaint filed herein, Plaintiffs allege:

Count II

I

Plaintiffs incorporate herein by reference, the same as if herein set forth in full, the allegations contained in Paragraphs I through VII of the Complaint filed in this cause, and as if such allegations had been re-alleged and averred here in full.

II

At the time said real estate contract and escrow instructions were entered into, defendants were informed by plaintiffs that they were acquiring said property for the purposes of development and that plaintiffs intended to construct, and still intend to construct, approximately 1,250 apartment units on such property, a shopping center on approximately 10 acres of said property and develop the

balance for industrial purposes.

III

In anticipation of the conveyance of said property by defendants, plaintiffs incurred expenses for plans and designs incident to the proposed development of the subject property, which plans and designs, due to the delay caused by defendants' failure to convey the subject property to plaintiffs, are no longer usable in connection with the development of the property, all to the damage of plaintiffs.

The exact amount of such damages is as yet undetermined, but proof thereof will be offered at the trial of this cause.

IV

Since the aforesaid contract and escrow instructions were entered into by plaintiffs and defendants, costs of construction have increased and continue to increase, and plaintiffs' development costs of the subject property will increase, which increase is caused by defendants' failure to convey the subject property to plaintiffs, all to the damage of plaintiffs. The exact amount of such increased costs, which increased costs are continuing, is as yet undetermined and unknown to plaintiffs, but proof thereof will be offered at the trial of this cause.

V

Since the aforesaid contract and escrow instructions were entered into by Plaintiffs and the Defendants, costs of construction and mortgage money has

increased over the rate that was available to plaintiffs at the time the aforesaid contract and escrow instructions were entered into, the additional cost of such financing being caused by defendants' failure to convey the subject property to plaintiffs, all to the damage of plaintiffs. The exact amount of such increased costs, which are continuing, is as yet undetermined and unknown to plaintiffs, but proof thereof will be offered at the trial of this cause.

VI

The defendants' failure to convey the subject property has delayed its development by plaintiffs, and as a consequence thereof, plaintiffs have incurred loss of rents and profits which would have been derived from such property from the time of its development to the present. Since entering into the aforesaid contract, other property surrounding the subject property has been developed in the same manner as contemplated by plaintiffs and, therefore, the future rents and profits which can be realized by plaintiffs have been reduced by defendants' failure to convey the subject property to plaintiffs. The exact amount of the loss of past rents and profits, as well as those expected in the future, which are continuing, is as yet unknown to plaintiffs but proof thereof will be offered at the trial of this cause.

VII

Plaintiffs paid the amounts alleged in the original Complaint filed herein and incurred and paid the additional costs as alleged in this Count II, by reason of

the entering into the aforesaid contract and escrow instructions, and the defendants' promise that title to the subject property would be conveyed to them. Due to the failure of defendants to convey title to plaintiffs in accordance with the aforesaid contract and escrow instructions plaintiffs have lost the use of their money so incurred and paid, and are entitled to interest thereon. The exact amount of such damages is as yet unknown to plaintiffs, and such damages are continuing, but proof thereof will be offered at the trial of this cause.

VIII

Plaintiffs have employed attorneys to institute this cause of action and that cause of action as alleged in the original Complaint filed herein. The necessity of such action on the part of the plaintiffs was occasioned by the defendants' failure to convey the subject real estate in accordance with the terms of the aforesaid contract and escrow instructions. The exact amount of such damages is unknown to plaintiffs as yet, and such costs are continuing, but proof thereof shall be offered at the trial of this cause.

IX

In the alternative, defendants have retained possession of the subject property by reason of their failure to comply with the terms of the aforesaid contract. Such action on the part of defendants was wrongful and to the loss and damage of the plaintiffs to the extent of the uses, profits and fair rental value derived from the subject property. The exact amount

of such loss and damage is unknown to the plaintiffs as of this time, and is continuing, but proof thereof shall be made at the trial of this cause.

WHEREFORE, plaintiffs demand, in addition to the demand for judgment set forth in the original complaint, which is hereby incorporated herein by reference, judgment against the defendants for damages to the plaintiffs as follows:

1. Damages for expenses incurred by plaintiffs for plans and designs for the development of the subject property in the amount to be determined from the evidence at the trial of this cause;

2. Damages for the increase in construction costs for the development of the subject property in an amount to be determined from the evidence at the trial of this cause;

3. Damages for the increased costs of interim construction and mortgage money in connection with the development of the subject property in an amount to be determined from the evidence at the trial of this cause;

4. Damages for the loss of past and future rents and profits to plaintiffs by reason of defendants' delay in conveying the subject property in an amount to be determined from the evidence at the trial of this cause;

5. Damages for loss of the use of monies invested in the subject property in an amount to be determined from the evidence at the trial of this cause;

6. Damages for expenses incurred by plaintiffs in enforcing the terms of the aforesaid contract and escrow instructions in an amount to be determined from the evidence at the trial of this cause;

7. In the alternative, damages for the uses, profits and fair rental value of the subject property in an amount to be determined from the evidence at the trial of this cause;

8. For the costs of this action and such other and further relief as to the Court seems just and proper in the premises.

Dated at Phoenix, Arizona, this 27th day of January, 1972.

RANDOLPH, KELLY & CORBIN

By /s/ Hubert E. Kelly

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S MOTION TO STRIKE BUYERS' AMENDMENT TO COMPLAINT; MOTION TO DISMISS BUYERS' ORIGINAL COMPLAINT AND ALL AMENDMENTS; AND MOTION FOR JUDGMENT ON THE PLEADINGS

Filed: February 7, 1972

Defendant F. M. Cocke moves the Court to strike plaintiff Buyers' Amendment to Complaint, filed January 27, 1972, to dismiss Buyers' original complaint filed in April, 1969, and all amendments filed thereafter, and for judgment on the pleadings on his counterclaim against Buyers, upon the following grounds.

MOTION TO STRIKE AMENDMENT
OF JANUARY 27, 1972

Plaintiff Buyers' proposed Amendment filed January 27, 1972, does not conform to the Court's leave to amend granted by the Minute Orders of September 15 and 23, 1971. The minute orders denied leave to amend as to damages as far as Joan H. Cocke is concerned. Buyers' proposed Amendment demands judgment as follows:

"WHEREFORE, plaintiffs demand, in addition to the demand for judgment set forth in the original complaint, which

is hereby incorporated herein by reference, judgment against the defendants for damages to the plaintiffs as follows:. . ."

On the face of the record it is manifest that Buyers' Amendment should be stricken, unless the Minute Orders of September 15 and 23, 1971 are amended. This defendant is entitled before the trial on damages to a ruling on whether or not he is to be the sole party with obligations under the consolidated real estate and escrow agreement at such trial, in the event it be held as now scheduled.

MOTION TO DISMISS

Clearly, this Court was and is without jurisdiction over the subject matter of Buyers' complaint, in its original form and as sought to be amended, since no court has the power to grant the relief demanded by Buyers. Buyers demand specific performance of the consolidated real estate agreement and escrow agreement with Transamerica without joining Transamerica. 16 ARS, Rules of Civil Procedure 12(b)1, 6 and 7, as amended and 12(i) 2 and 3, as amended.

I.

JURISDICTION OF THE COURT

A preliminary question is one of jurisdiction.

State of Minnesota v. Hitchcock, 185 U.S. 373, 46 L.ed 954, 22 S. Ct. 650, states the rule that:

> A preliminary question is one of jurisdiction. It is true counsel

> for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law.

By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Cooper v. Reynolds, 10 Wall (U.S.) 308, 316; 19 L.ed 931.

The following cases are material here as showing fundamental doctrines as enunciated by the Arizona Supreme Court. State trial court judges have for many years been charged with knowledge of these fundamentals.

> No court may acquire complete jurisdiction to hear and determine any cause until it has obtained through due process, prescribed by law, jurisdiction over both subject matter and the parties, and the power to render the particular judgment that was rendered.

Schuster v. Schuster (1953) 75 Ariz. 20, 251 P.2d 631; Van Ness v. Superior Court of State in and for Maricopa County (1950) 69 Ariz. 362, 213 P.2d 899; Wall v. Superior Court of Yavapai County (1939) 53 Ariz. 344, 89 P.2d 624.

The first duty of any court is to determine whether it has jurisdiction in the premises, and in so determining it is acting judiciously. State v. Phelps (1948) 67 Ariz. 215, 193 P.2d 921.

Jurisdiction of the subject matter cannot be waived, as by all parties' acquiescence in the proceedings had, and the question of the court's jurisdiction over the subject matter may be raised at any time, as on appeal for the first time. In re Baxter's Estate (1921) 22 Ariz. 91, 194 P. 333.

A judgment is void on its face and is subject to collateral attack unless court has jurisdiction of the subject matter, of the persons involved in the litigation, and to render the particular judgment given. Hallford v. Industrial Commission (1945) 63 Ariz. 40, 159 P.2d 305; Latham v. McClenny (1930) 36 Ariz. 337, 285 P. 684. (emphasis added)

Buyers' Complaint incorporated as an exhibit a copy of the consolidated real estate and escrow agreement of October 9, 1968 with Transamerica. A copy is attached hereto. The face of the complaint, therefore, made it clear to all who read

it that the proposed sale and purchase was to be consummated, or was to fail, in accordance with the applicable provisions of the escrow agreement. Further, an examination of the fine print paragraphs 16-25 (enlarged) will reveal that the powers granted to the escrow agent, and the duties imposed upon it, by Buyer and Seller, actually made Transamerica the dominant party to the consolidated contract in the determination thereunder of whether such consummation or such failure was to be the final result. Paragraphs 16-23 of the fine print escrow instructions, in the event of noncompliance with the escrow instructions by either Seller or Buyer during the specified 13-day cancellation period, command cancellation of the escrow instructions and other contracts, and their retention, and authorize Transamerica to return documents such as deeds. Paragraph 24 commands Transamerica to return or retain the documents in the event of Transamerica's own inability or unwillingness to comply with the escrow instructions, or its own unwillingness to issue its title policy.

It is elemental that a party to a contract cannot come into court, as did Buyers, seeking the enforcement of only its claimed rights under selected provisions of the contract, without regard to its obligations, and the rights and obligations of the other parties, under the other provisions also incorporated into its pleading, since such relief is beyond the power or jurisdiction of the court to grant. Clearly, neither Buyers nor the court had any more power to delete the cancellation provisions from the escrow instructions portion of the consolidated contract than to add Parcels

1A and 2A to the real estate portion. Likewise, neither had any more power to reduce the price per acre in the real estate portion, so that F. M. Cocke's deeds to Parcel 2 and his half-interest in Parcel 1 could be properly recorded subject to mortgages to be simultaneously recorded for $52,000 less than the amount due, than to rewrite the trustee Bank's escrow instructions to specify control of the trust land proceeds by Joan H. Cocke instead of Joan H. Cocke and F. M. Cocke jointly.

As pointed out in a unanimous decision by the Supreme Court, sitting en banc, in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc. v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

And quoting McCall v. Carlson, 63 Nev. 390, 172 P.2d 171, 187-188:

> Our equitable powers do not extend so far as to permit us to disregard fundamental principles of the law of contracts, or arbitrarily to force upon parties contractural

> obligations, terms or conditions, which they have not voluntarily assumed. In this regard, equity respects and upholds the fundamental right of the individual to complete freedom to contract or decline to do so, as he conceives to be for his best interest, so long as his contract is not illegal or against public policy. In this respect, and many others, equity follows the law.

And citing Man. Finance Co. v. McKey, 294 U.S. 442, 55 S. Ct. 444, 79 L.ed 982; Cox v. Freeman, 204 Okl. 138, 227 P.2d 670, 28 ALR 2d 1230:

> It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh.

Manifestly, the Goodman v. Newzona decision is in complete accord with the prohibition against impairment of contract obligations by state courts contained in Article 1, Section 10, of the United States Constitution and in the due process and equal protection clause of the Fourteenth Amendment.

In 21 CJS, Courts, Section 120, CJS relies on McKnett v. St. Louis and San Francisco Railway Co., 292 U.S. 230, 54 S. Ct. 690, 78 L.ed 1227, reversing 149 So. 822, 227 Ala. 349, for this well settled doctrine:

> The power of a State to determine the limits of jurisdiction of its courts and the character of the controversies which shall be heard is, of course, subject to the

> restrictions imposed by the Federal Constitution. (emphasis added)

The Alabama Supreme Court had held that:

> The question whether the (Alabama) circuit court had jurisdiction is to be determined by the Constitution and laws of this state creating the courts and defining and limiting their jurisdiction. There is no restriction of the Federal Constitution upon the power of a state to determine the limits of the jurisdiction of its courts, except that the state must give to the citizen of other states the same rights that it accords to its own citizens. (emphasis added)

In Evans v. Hallas (1946) 64 Ariz. 142, 167 P.2d 94, the Arizona Court pointed out that neither the legislative, the executive, nor the judicial departments have the power to deprive a person of a right granted by the Arizona Constitution. Since that constitution adopts the Federal Constitution as the supreme law of the land, it is of course clear that a state court is completely without the power, or jurisdiction, to deprive a person of the rights or immunities granted by the Federal Constitution. One of these is the right to enforce contract obligations, without impairment by the judicial department.

16 Am Jur 2d 643, Constitutional Law, quotes Scott v. McNeal, 154 U.S. 34, 38 L.ed 896, 14 S.Ct. 1108:

> The prohibitions of the Fourteenth Amendment, against depriving any person of life, liberty or property with-

> out due process of law or denying the equal protection of the laws, extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities.

In Section 491, Am Jur 2d points out that the inhibitions of the Fourteenth Amendment include all the departments of state government, including not only the political, but also the judicial, and quotes Shelley v. Kraemer, 334 U.S. 1, 92 L.ed 1161, 68 S. Ct. 836, 3 ALR 2d 441:

> The action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the meaning of the equal protection clause.
>
> (emphasis added)

An obligation owing under a contract is property, and equal protection of the laws obviously protects against judicial enforcement of contract obligations against less than all parties mutually bound.

Speaking of the due process clause of the Fourteenth Amendment, Am Jur 2d states in Section 554:

> The object of the constitutional guaranty of due process of law is to preserve personal and property rights against the arbitrary action of public officials. The guaranty is violated whenever any person, by virtue of public position under the federal or state government, deprives another of any right protected by that amendment.

As stated by 21 CJS, Courts, the authority to hear the case at all is what makes up jurisdiction (Section 26), and the subject matter of a suit means the nature of the cause of action, and the relief sought (Section 35b).

It is pointed out in 49 CJS, Judgments, Section 19a, 19c, and 19d, that a court cannot render a valid judgment unless it has jurisdiction over the subject matter of the litigation or the cause of action, and jurisdiction to render judgment for the particular remedy or relief sought, citing:

Varnes v. White, 40 Ariz. 427, 12 P.2d 870; Wall v. Superior Court of Yavapai County, 53 Ariz. 344, 89 P.2d 624; Hill v. Favour, 52 Ariz. 561, 84 P.2d 575; Arizona Land & Stock Co. v. Markus, 37 Ariz. 530, 296 P. 251; Western Land & Cattle Co. v. National Bank of Arizona at Phoenix, 29 Ariz. 51, 239 P. 299.

It is crystal clear from the face of Buyers' complaint and the face of the consolidated real estate and escrow agreement sought to be enforced, and incorporated into the complaint as an exhibit, that Buyers' cause of action was a claimed right to relief by performance of less than all the mutually binding provisions by less than all the parties mutually bound, and therefore crystal clear that the cause of action was a claimed right to relief by impairment of contract obligations and by denial of due process and equal protection of the laws.

It must be concluded, therefore, that the trial court had and has no jurisdiction over the subject matter of Buyers' complaint and no authority to proceed on the complaint at all, except to dismiss it.

* * *

The following three cases may help to clear up some of the apparent confusion in connection with the term "indispensable party."

In Connally v. Great Basin Insurance Co. (1967) 6 Ariz. App. 280, 431 P.2d 921, the court said:

> Traditionally, parties have been divided into categories of "proper," "necessary," and "indispensable." See Oglesby v. Chandler, 37 Ariz. 1, 288 P. 1034 (1930) and Clarke, Code Pleading (2d ed. 1947), pp. 358-362, 365-367, 380-386. It appears to be the law of this jurisdiction that the failure to join an "indispensable" party is a jurisdictional defect and deprives the court of the power to adjudicate as between the parties already joined. Siler v. Superior Court, 83 Ariz. 49, 316 P.2d 296 (1957); and see Gorsuch v. Fireman's Fund Insurance Co., 360 F.2d 23 (9th Cir. 1966).

In Gorsuch, the 9th Circuit Court of Appeals said:

> We recently had occasion to deal with the problem of indispensable parties in Lewis v. Lewis, 9 Cir., 358 F2d 495, decided on March 14, 1966. We there noted and applied the governing principles as stated in State of Washington v. United States, 9 Cir., 87 F.2d 421, 427-428. Applying the same principles here we hold that Doig is an indispensable party to the determination of the rights and obligations involved in the suit now before us. (emphasis added)

and in State of Washington v. United States (1936), the 9th Circuit said:

In cases where there is error in non-joinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as "jurisdictional." The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from Shields v. Barrow, supra., 17 How. 130, 141, 15 L.ed 158: "As is observed by this court, in Mallow v. Hinde, 12 Wheat. (193) 198 (6 L.ed 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'" See, also, Barney v. Baltimore, supra., 6 Wall. 280, 285, 18 L.ed 825; State of California v. Southern Pac. Co., supra., 157 U.S. 229, 250, 15 S. Ct. 591, 39 L.ed 683; Minnesota v. Northern Securities Co., supra., 184 U.S. 199, 236, 22 S. Ct. 308, 46 L.ed 499; Bogart v. Southern Pac. Co., supra., 228 U.S. 137, 146, 33 S. Ct. 497, 57 L.ed 768.

It is abundantly clear that whether one of the parties to a valid contract be called "necessary" or "indispensable," no court can enforce either his rights against the other parties or his obligations owed to them, unless he is joined in the action. Since no court can rewrite the contract so as to delete any of its provisions, but must enforce the entire contract, in the absence of any party mutually bound, in favor of whom or against whom any mutual

right or obligation must be enforced, the court cannot proceed at all.

Obviously, parties subject to joinder over whom the court has no jurisdiction merely because not named, and whose absence leaves the court without power to grant the relief sought, and so without jurisdiction over the subject matter, qualify as parties indispensable under Rule 19.

II

EFFECTS OF LACK OF JURISDICTION OVER SUBJECT MATTER

It is pointed out in 21 CJS, Courts, Sections 113-119, and cases cited, that the judge of a court is bound to make a preliminary examination of the court's jurisdiction over the subject matter, particularly where such lack of jurisdiction appears on the face of the complaint, as here; that where the court is without jurisdiction the acts of the court or the judge are a mere nullity and void, not voidable, and the court is without power to allow an amendment which would confer jurisdiction.

Since the court itself is without power to act without jurisdiction over the subject matter, it is clear that any such act is the act of the judge, not the court. This is borne out in 46 Am Jur 2d, Judges, Sections 75-81, and cited cases, which state the rule that where there is no jurisdiction over the subject matter, the exercise of any authority by the judge is a usurpation, and the judge, not the court, is liable.

This rule, that it is only the judge

and not the court that has proceeded without court jurisdiction over the subject matter, is the basis for the further rule (21 CJS, Courts, Sections 108-112) that a lack of such jurisdiction is not waived by answer, general demurrer, failing to demur, failing to object to, or otherwise raise the question of jurisdiction, going to trial on the merits, moving for a new trial, appealing, or partially complying with the judgment. Moreover, jurisdiction over the subject matter cannot be based on estoppel or waiver, and lack of it may be objected to in any manner and at any stage of the proceedings, even on appeal.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S. Ct. 236, the court pointed out, quoting Scott v. McNeal, 154 U.S. 34, 46; 38 L.ed 896, 901; 14 S. Ct. 1108, that:

> No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

and went on to say:

> No state can, by any tribunal or representative, render nugatory a provision of the supreme law.
>
> Such is the settled doctrine of this court. In the leading case of Thompson v. Whitman, 18 Wall. 457, 468, 21 L.ed 897, 901, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in

one state may be questioned in a collateral proceeding in another state, notwithstanding the averments in the record of the judgment itself. The court, among other things, said that if it be once conceded that "the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent." This decision was in harmony with previous decisions. Chief Justice Marshall had long before observed in Rose v. Himely, 4 Cranch, 241, 269, 2 L.ed 608, 617, that, upon principle, the operation of every judgment must depend on the power of the court to render that judgment. In Williamson v. Berry, 8 How. 495, 540, 12 L.ed 1170, 1189, it was said to be well settled that the jurisdiction of any court exercising authority over a subject "may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings," and that the rule prevails whether "decree

> or judgment has been given in a court of admiralty, chancery, ecclesiatical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municiple laws of states." (emphasis added)

Objections to the jurisdiction of the court below, when they go to the subject matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court. Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 25 L.ed 206.

In Earle v. McVeigh, 91 U.S. 503, 23 L.ed 398, the court said:

> Want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under the judgment, since want of jurisdiction makes the judgment utterly void and unavailable for any purpose.

In Clark v. Arizona Mut. Savings & Loan Assn. (D.C. 1914) 217 F. 640, affirmed 220 F. 1, 135 C.C.A. 577, certiorari denied 35 S. Ct. 791, 238 U.S. 628, 59 L.ed 1496, the court said:

> Although a court has jurisdiction of the subject matter and of the parties, its power to render a valid judgment is limited by the nature of the suit and the issues made by the pleadings, and if it transcends such limits its judgment is void. (emphasis added)

In Parker v. Uchida (1912) 14 Ariz. 57, 125 P. 715, the court said:

> As a general rule defects in the court's jurisdiction over the subject matter of an action cannot be cured.

In Morris v. Gilmer, 129 U.S. 315, 32 L.ed 690, 9 S. Ct. 289, the court pointed out:

> But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (28:462, 463) "which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for himself, even when not otherwise suggested, and without respect to the relations of the parties to it."

In Ronan v. First National Bank of Arizona (1962) 90 Ariz. 341, 367 P.2d 950, the court, sitting en banc, unanimously concurred in an opinion written by Justice Lockwood holding that the judgment of the trial court was void ab initio in the absence without notice of one of the beneficiaries of a trust contract. The case concerned four minor children who, the court held, were not properly brought before the court. The court said, quoting Sleeper v. Killion, 166 Iowa 205, 214, 147 N.W. 314, 317 (1914), a case in which the parents were served on behalf of the minors in accordance with the statute but the minors were named only in the petition:

> All these cases. . . (holding such service void) are predicated on the thought that no one can be deprived of life, liberty, or property without due process of law; that notice is essential to due process of law; that in the citation, summons, or process of any kind requiring a person to appear in a court of record, to answer to a charge made against him, he must have notice of the proceedings.

and the Arizona Court said:

> The minors are contingent beneficiaries under the trust, and the instrument provides that they are to receive the corpus upon the trust's termination. They are indispensable parties in any determination of the disposition of the trust funds, which would inevitably affect their rights thereunder. Thus a decision in accordance with C. B.'s wishes of necessity dim-

> inishes the corpus in which the minors have an interest, and no judgment can be rendered. . .without injuriously affecting the rights of others not brought into action. Therefore the minors were indispensable parties to the suit.
>
> For the foregoing reasons we hold the judgment below was void ab initio, and is therefore set aside. (emphasis added)

The Arizona Court's decision is in complete accord with the federal cases cited and quoted above, particularly with Shields v. Barrow, 17 How. 130, 141, 15 L.ed 158, quoted by the 9th Circuit in State of Washington v. United States (page 9 above).

In Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F. 2d 514, states the rule as follows:

> The threshold question is whether jurisdiction exists. Appellant strenuously asserts that there was no jurisdiction in the district court, and that we must therefore vacate the and remand with directions to dismiss. Jurisdiction was not challenged in the district court, in fact all parties proceeded as though the court had power to act. However, as suggested by appellant, jurisdiction may not be conferred by consent and lack of jurisdiction of the subject matter cannot be waived by the parties or ignored by the court; if jurisdiction is lacking the trial court should on its own motion decline to proceed and if the case is tried where jurisdiction is lacking, the jurisdiction of the appellate court on review is limited to

> correcting the error of the trial court in entertaining the action. These principles are fundamental and were recognized and applied by us in the recent case of Rock Island Millwork Co., v. Hedges-Gough Lumber Co., 337 F.2d 24, 26-27 (8 Cir. 1964).

Rule of Civil Procedure 12 (i), 16 ARS, page 41 of the 1971-72 Pocket Part, includes, in accordance with the above cases:

> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (emphasis added)

III

JURSIDICTION OVER CONTRACTUAL RIGHTS AND OBLIGATIONS

The early case of Mallow v. Hinde, 12 Wheat (193) 198, 6 L.ed 599, cited and quoted in Shields v. Barrow by the 9th Circuit, in State of Washington v. United States (page 9 above), goes in simple language to the very root of the issue in the present case, which is the power of the trial court to adjudicate the rights and obligations of all the parties mutually bound by a multiparty contract without all of them before the court. In that case, as here, executory agreements were before the court, but without all the parties thereto whose right would have to be determined. The court said:

> This is an appeal from the decree of the Circuit Court for the district of Ohio, dismissing generally, with costs,

the bill of the appellants, who were plaintiffs in that court.

The suit was a contest for land in the district set apart on the northwest side of the Ohio, for the satisfaction of the bounty lands due to the officers and soldiers of the Virginia line, or continental establishment, in the revoluntionary war.

Neither Taylor, the trustee, nor the cestuis que trust, with whom the complainants allege Langham contracted for the land, are made defendants, they being out of the limits of the jurisdiction of the court.

For the appellees it is insisted, that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion. . . .They claim that survey, not by any assignment, or other instrument, investing them with a legal right to it, but by executory agreements, the validity and obligation of which the parties to them have a right to contest.

We cannot try their validity, and decide upon their efficacy, by affirming they confer upon the appellants an equitable right, without manifest prejudice to the rights of those not before the court. The complainants can derive no claim in equity to the survey, under, or through Langham's executory contracts with the Beards, unless these contracts be such as ought to be decreed against them

specifically by a court of equity. How can a court of equity decide that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to all the rules which govern courts of equity, and against the principles of natural justice.

In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

> We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court. (emphasis added)

Mallow v. Hinde is startlingly close to being on all fours with the present case, except that in that case some of the parties to the agreements were not made parties to the suit because they were out of the territorial limits of the jurisdiction of the court. Here, all the parties to the consolidated real estate and escrow agreement were and are subject to joinder,

but some were simply not named.

Perhaps the best way to illustrate the futility of attempting to make a final determination of the rights and obligations of all the parties to the executory agreement in this present case, without joinder of all such parties, is to point out the predicament in which the various parties to the agreement would be left by the proposed piecemeal adjudication, in addition to the abuse of process inherent therein.

It is not disputed that on March 5, 1969, immediately following the unsuccessful attempt by Buyers and the escrow officer to obtain F. M. Cocke's signature to the warranty deed which included Parcel 2A and a half-interest in Parcel 1A, F. M. Cocke filed a notice of intention to cancel upon failure of Buyers to comply with the escrow instructions within the 13-day period, as provided by paragraphs 16-23 and 25 of the fine print escrow instructions.

And it is not disputed that the Buyers' letter, dated March 5, 1969, of instructions to Transamerica as escrow agent, received by it on March 7, 1969, directed it to:

ITEM I. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions accompanying the delivery of its deed into escrow in October, 1968.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers. These parcels are long narrow strips of land which contain a large drainage canal, abutting the south boundary lines of Parcels 1 and 2. Neither the trustee Bank nor F. M. Cocke has ever executed any deeds to Parcels 1A or 2A, either quit-claim or warranty, since neither had title. Such parcels were for that reason specifically excluded from the land agreed to be sold, and were not the subject of any contract.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, delivered into escrow by means of Buyers' letter, as the annual payment which entitled Buyers to their first releases, which as provided they had chosen to take in Parcel 1.

In a second letter to the escrow agent dated March 26, 1969, Buyers affirmed the position taken by them in their letter of instruction to the escrow agent dated March 5, 1969.

ITEM 1

The trustee Bank's instructions to the escrow agent provided for joint control of the principal proceeds of the proposed sale by F. M. Cocke and Joan H. Cocke, in accordance with the trust agreement. However, Buyers made out their check, note and mortgage, purportedly representing the balance

due on the trust land, in favor of Joan H. Cocke. This was approved by Transamerica on March 10, 1969, but it reversed its position on February 27, 1970, taking the position it could not use the Bank's deed, because payment of the proceeds to Joan H. Cocke violated the Bank's instructions.

Neither Transamerica, the trustee Bank, nor any of the three trust remaindermen were named in Buyers' Complaint, and the trial judge's Minute Order of December 8, 1970 granted summary judgment in favor of Buyers against only F. M. Cocke, not against Joan H. Cocke. Further litigation will therefore be necessary to determine whether or not:

(1) a court can rewrite the trust agreement or the trustee Bank's escrow instructions, as held in Cocke v. Cocke (September, 1970) 13 Ariz. App. 57, 474 P.2d 64;

(2) if not, whether or not Transamerica can continue to refuse to deliver the Bank's deed to Buyers, with title policy;

(3) if not, since it is well settled that if the deed is delivered in violation of the Bank's escrow instructions it will vest no title in grantee, and also well settled that the remaindermen can follow either the land or the proceeds to recover their losses, and if they retake the land, whether or not Transamerica can refuse to refund to Buyers, under the title policy, the $124,000 caused to be paid to Joan H. Cocke;

(4) if not, whether or not Transamerica can recover its loss of the $124,000

from any person connected with the case, and

(5) if the answer to (2) is yes, whether the three remaindermen can recover from trustee Transamerica or the trustee Bank or any other person connected with the case any trust principal funds paid to Joan H. Cocke because of lack of interest income on trust property proceeds, with punitive damages, or any trust principal funds taken by Joan H. Cocke by garnishment under Cocke v. Cocke.

Clearly, Transamerica overlooked until February 27, 1970, and Buyers and this Court continue to disregard, the undisputed fact that when Joan H. Cocke signed the consolidated agreement on October 9, 1968, she agreed to sell only the interest she then had in the trust land: the lifetime beneficial interest entitling her to the income from the trust half-interest in the particular piece of land designated as Parcel 1. Under settled doctrines of trust law she could have insisted on this particular income if she had not agreed to the sale by signing, at the same time as F. M. Cocke. On October 9, 1968, the legal title to the trust half-interest in Parcel 1 remained indisputably in the trustee Bank and the equitable title in the three remaindermen daughters. These facts were made known to all parties to the escrow agreement before any papers were signed. It was the trustee Bank, not Joan H. Cocke, which executed the deed to the trust half-interest in Parcel 1, on joint instructions from F. M. Cocke and Joan H. Cocke, as required by the trust agreement. It was the trustee Bank, not Joan H. Cocke, which placed the condition on the sale of the trust land, accompanying the delivery of its deed into

escrow, that the proceeds were to be jointly controlled by Joan H. Cocke and F. M. Cocke, as was the land itself. And it is the trustee Bank, not Joan H. Cocke, whose presence would be necessary in any determination that such condition as to the proceeds is to be rewritten. The presence of all three of the remaindermen daughters would also be necessary, if such condition can be rewritten at all.

ITEM 2

The approval by Transamerica on March 10, 1969, of the proposed simultaneous recording of the trustee Bank's deed and of the mortgage for $32,000 less than the balance due, not yet retracted, and the approval thereof by the trial judge, implicit in his judgment in favor of Transamerica on its counterclaim and in his minute order in favor of Buyers on their complaint, will require further litigation:

(1) to overturn the fundamental and well settled doctrines of Higgins v. Kittleson (1965) 1 Ariz. App. 244, 401 P.2d 412, and cases cited, with respect to the rewriting of escrow instructions by an escrow agent;

(2) to overturn the fundamental and well settled doctrines of Goodman v. Newzona, quoted above at page 5, with respect to the rewriting of contracts by a court; and

(3) to overturn the fundamental and well settled doctrines of Mallow v. Hinde, quoted above at pages 15-17, with respect to the absence of the trustee Bank and the rewriting of its escrow instructions to Transamerica.

ITEM 3

The approval by Transamerica on March 10, 1969, of the proposed simultaneous recording of F. M. Cocke's deeds and of the mortgages for $52,000 less than the balance due, not yet retracted, and the approval thereof by the trial judge, implicit in his judgment and minute order in favor of Transamerica on its counterclaim and Buyers on their complaint, as in Item 2, will require further litigation:

(1) to overturn Higgins v. Kittleson and Goodman v. Newzona with respect to the rewriting of real estate contracts and escrow instructions by an escrow agent or by a court, as in Item 2.

ITEM 4

The approval by Transamerica on March 10, 1969, of the escrow officer's attempt on March 5, 1969 to secure, and of Buyers' demand for, warranty deeds to Parcels 1A and 2A, not part of any contract, and the approval thereof by the trial judge, implicit in his judgment and minute order in favor of Transamerica on its counterclaim and Buyers on their complaint, as in Item 2, will require further litigation:

(1) to overturn Higgins v. Kittleson and Goodman v. Newzona with respect to the rewriting of real estate contracts and escrow instructions by an escrow agent or by a court, and overturn Roehm v. Horst, 178 U.S. 1, 20 S. Ct. 780, 44 L.ed 953, and Equitable Trust Co. of New York v. Denver and R. G. R. Co. v. Western Pac. R. Co. (1917) 244 F.2d 485, affirmed CCC, 2d (1918) 250 F 327, cert. den. (1918) 246

U. S. 672, 62 L.ed 932, 38 S. Ct. 432, with respect to repudiation of contracts by making new demands. In the Equitable Trust Case, Hand, Distict Judge, said:

> To say that you will not pay as bound unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. That is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.
> (emphasis added)

(2) to compel F. M. Cocke and the trustee Bank to execute valid warranty deeds to Parcels 1A and 2A, which parcels were not part of any contract and to which neither F. M. Cocke nor the trustee Bank has ever had title.

ITEM 5

Although Buyers' Complaint, on which summary judgment by Minute Order of December 8, 1970 was granted, did not name Transamerica, it demanded that the Court order Transamerica to deliver the releases, admittedly a prerequisite to development, to Buyers upon payment of the sums entitling Buyers thereto, as provided in the agreement. As specified in Buyers' letter of instructions, the two $32,000 payments, one to Joan H. Cocke and one to F. M. Cocke, which would entitle Buyers to their first releases of mortgage, on about 8 acres in Parcel 1, had to await Items 1, 2, 3, and 4. In addition to the required procurement of the warranty deeds to Parcels 1A and 2A from F. M. Cocke and the trustee Bank,

for which no precedent exists in law, the payments for the delivery of the releases to Buyers had to await the recording of the trustee Bank's deed to the trust half-interest in Parcel 1. But Transamerica is no longer willing to record this deed because the proposed payment of the proceeds to Joan H. Cocke violates the trustee Bank's instructions. Even if Transamerica were to reassume its earlier position and decide to record such deed, and issue its title policy, the settled doctrines of Higgins v. Kittleson, and cases cited, supra, would prevent title from vesting in grantee, and the trust remaindermen would have little trouble in retaking the land.

In addition to the above two prerequisites to any development by Buyers, which were imposed by Buyers themselves in their letter of escrow instructions dated March 5, 1969, the recording of the Bank's deed is a prerequisite required by law: since the trust interest in Parcel 1 is an undivided half-interest, no valid releases of mortgage on the 8 acres in Parcel 1 can be delivered to Buyers by Transamerica until after the recording of the Bank's deed.

On January 24, 1972, Transamerica expressed before the Court of Appeals its unwillingness to close the escrow, and issue its title policies to Buyers in accordance with their new demands, notwithstanding Cocke v. Cocke and the trial judge's minute order granting Buyers' motion for summary judgment on their complaint. Transamerica mentioned to the Court of Appeals, as an amount it could lose by closing the escrow at this time, about a half-million dollars, thereby

evidencing misgivings, at least, concerning the recording of deeds and issuance of title policies on F. M. Cocke's Parcel 2 and his half-interest in Parcel 1, as well as on the trust half-interest in Parcel 1.

So far, Transamerica has made no direct statement, as it has with respect to the trustee Bank's deed, that it is now unwilling to use F. M. Cocke's two deeds because Buyers' new demands also violate the escrow instructions, agreed to by all parties, of the depositor of such deeds.

This much, however, is clear: On January 24, 1970, Transamerica was not willing to close the escrow in accordance with Buyers' new escrow instructions, and insure title against actions by F. M. Cocke and the remaindermen to retake the land, for about a half-million dollars, (1) on any theory that such closing would not violate the escrow instructions agreed to by all parties, (2) on any theory that Cocke v. Cocke and the trail judge's minute order granting summary judgment in favor of Buyers on their complaint overturned Higgins v. Kittleson, and cases cited, Goodman v. Newzona, and Mallow v. Hinde, supra, or (3) on any theory that Transamerica would be able to recover its losses by first finding and then collecting the half million dollars from among the persons responsible for the loss.

Manifestly, Transamerica is still maintaining the position held by it since March 19, 1969: it remains unwilling to comply with the escrow instructions, either the instructions agreed to by all parties, or Buyers' new escrow instructions

contained in their letter dated March 5, 1969. Transamerica therefore has remained, at its own risk, unwilling since March 19, 1969 to comply with the fine print instruction paragraph 24, which as agreed to by all parties commands return of the deeds deposited by the trustee Bank and F. M. Cocke in the event the escrow agent is unwilling to comply with the escrow instructions, or Transamerica is unwilling to issue its title policies.

IV.

THE SCHEDULED TRIAL ON DAMAGES

The trial now scheduled for February 23, 1972, has been limited by minute order to determination of the amount of damages claimed by Buyers in their Complaint to be due them for delay in their planned development, claimed by Buyers to have been caused solely by F. M. Cocke.

However, since the Court was and is without jurisdiction to proceed at all on Buyers' Complaint, except to dismiss it, the trial, to be held by the judge, will constitute merely additional abuse of process, for which the judge, not the Court, will be liable. CJS, Am Jur 2d, and Arizona and United States Supreme Court cases, supra.

ARS, Section 13-811, provides:

> A public officer or person pretending to be a public officer, who, under pretense or color of any process or other legal authority, arrests or detains a person against his will, or seizes or

> **levies** upon property, or dispossesses a person of lands or tenements, without a legal process or other lawful authority therefor, is guilty of a misdemeanor.

ARS, Section 44-1211, 2 and 3 (a), provide:

> A person is guilty of a misdemeanor who:
>
> 2. Is a party to any bond, action or judgment, or execution, contract or conveyance had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.
>
> 3. Is a party as provided in paragraph 1 or paragraph 2 of this section, and
>
> (a) At any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends such transaction as true, and had or made in good faith, . . .

See also 1 Am Jur 2d, Abuse of Process, Sections 13, 18, 19, 25, 26; Monroe v. Pape, 306 U. S. 167, 81 S. Ct. 473, 5 L. ed 492.

Further, as related above under III, Jurisdiction Over Contractural Rights and Obligations, Transamerica is evidently well aware that it is not bound by the ruling of Cocke v. Cocke that Joan H. Cocke is entitled to the trust land

proceeds, since neither trustee Transamerica, nor the trustee Bank, nor the trust remaindermen, were before the court in that case. Likewise, it is not bound by the trial judge's ruling in favor of Buyers on their demand that the Court order Transamerica to deliver the releases of mortgage to Buyers, since Buyers did not name Transamerica as a defendant. Clearly, Transamerica's unwillingness to close the escrow in accordance with Buyers' new instructions, and to insure Buyers' titles for about a half million dollars, was not prevented by Cocke v. Cocke, nor can it be cured by final judgment in favor of Buyers on their Complaint. Until Goodman v. Newzona, supra, is overturned, even a new action by Buyers against Transamerica could not rewrite paragraph 24 so as to take away the option therein granted by Buyer and Seller to the escrow agent to refuse at will (for any reason other than cancellation under 16-23) to comply with the escrow instructions, or the right of Transamerica to refuse at will to issue its title policies, the only condition attached to the exercise of either option being the mandatory return of the deeds deposited into escrow by the trustee Bank and F. M. Cocke.

Of course, it is not known at this time, at least by this defendant, whether or not Transamerica has reversed its position again since January 24, 1972 on closeing the escrow in accordance with Buyers' new instructions. However, it should not be overlooked that as of February 23, 1972, the damages claimed by F. M. Cocke, for himself and the remaindermen, for delay in return of the deeds, will still be less than one-fifth of the half million dollars Transamerica admitted it could

lose by such closing.

Even if Transamerica has again so changed its position, this defendant has as yet received no notice that the escrow has actually been closed since January 24, 1972, in accordance with Buyers' new escrow instructions, along with the necessary recording of the deeds and mortgages and the issuance of the policies insuring the titles in Buyers. Since even Buyers could scarcely claim as a matter of business practice, and even the trial judge could scarcely rule as a matter of law, that Buyers were entitled to begin their development on any part of Parcel 1 or 2 before they took possession of such part under title, not to mention the problems of the releases of mortgage, it appears that the date of any actual recording of the deeds and mortgages by the escrow agent, subsequent to January 24, 1972, and thus the beginning of any period of time during which it was possible for F. M. Cocke to cause delay in Buyers' development, must await the testimony of the escrow officer on February 23, 1970, in the event the trial be held as scheduled.

The relief demanded by Buyers' Complaint was clearly performance of less than all the mutually binding provisions of the consolidated real estate agreement and escrow agreement with Transamerica, without joining Transamerica. The cases and authorities cited and quoted above show that the Court therefore had and has no jurisdiction over the subject matter of such Complaint, and no authority to proceed on such Complaint at all, except to dismiss it. F. M. Cocke's Motion to Dismiss Buyers' Complaint and all

amendments should therefore be granted, as required by Rule of Civil Procedure 12 (i), 3.

In Industrial Commission v. Superior Court of Pima County (1967) 5 Ariz. App. 100, 423 P.2d 375, Rehearing denied, Reviewdenied, the court said:

> Affirmative defenses may be raised and determined on a motion to dismiss where the facts constituting the defense appear on the face of the complaint. Ross v. Ross, 96 Ariz. 249, 393 P.2d 933 (1964); Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951), cert. denied 343 U.S. 934, 72 S. Ct. 770, 96 L.ed. 1342, rehearing denied 343 U.S. 958, 72 S. Ct. 1050, 96 L.ed. 1358 (1952).

* * *

MOTION FOR JUDGMENT ON THE PLEADINGS

Clearly, the Court has no choice, under Rule of Civil Procedure 12 (i), 3, but to dismiss Buyers' Complaint.

Further, it is not disputed (1) that F. M. Cocke's 13-day notice of intent to cancel was filed in accordance with paragraphs 16-23 of the escrow instructions, (2) that Buyers failed within the 13-day period to comply with the escrow instructions agreed to by all parties, so cancelling the escrow and requiring the return of the deeds deposited by F. M. Cocke and the trustee Bank. Still further, it is not disputed (3) that Transamerica

clearly expressed its unwillingness to issue its title policy on F. M. Cocke's Parcel 2 in March, 1969, expressed its unwillingness to issue its title policy on the trust half-interest in Parcel 1 on February 27, 1970, and on January 24, 1972 expressed its unwillingness to issue its title policies on Parcels 1 and 2, so requiring under paragraph 24 the return by the escrow agent of the deeds deposited by F. M. Cocke and the trustee Bank, because of such unwillingness to issue the title policies. But it is not disputed that (4) the escrow agent has remained unwilling to return F. M. Cocke's deeds since March, 1969, unwilling since at least February, 1970, to return the trustee Bank's deed, and unwilling since January 24, 1972, to return all of such deeds, again requiring under paragraph 24 the return by the escrow agent of the deeds deposited by F. M. Cocke and the trustee Bank, because of such unwillingness to follow the escrow instructions in paragraph 24, which were also agreed to by all parties.

It should not be forgotten that Buyers' Complaint alleged that F. M. Cocke wrongfully refused to execute partial releases of mortgages, and also that F. M. Cocke refused to execute the deed required to be executed by him. However, it is now admitted that F. M. Cocke's deeds were delivered into escrow at least a month before Buyers delivered the twenty-five releases, and that F. M. Cocke executed the releases immediately upon notice that they had been delivered to escrow, on March 5, 1969.

Pursuant to Rule of Civil Procedure

92 (c), defendant F. M. Cocke therefore moves the court for judgment on the pleading on his counterclaim against Buyers.

Respectfully submitted this
7th day of February, 1972,

JOHNSON SHELLEY ROBERTS & RIGGS

By L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for defendant
F. M. Cocke
48 North Macdonald Street
Mesa, Arizona 85201

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S ANSWER TO BUYERS' AMENDED COMPLAINT

Filed: February 22, 1972

By way of Answer to plaintiff Buyers' Amended Complaint for Specific Performance of the real estate contract and escrow instructions to Transamerica, F. M. Cocke admits, denies and alleges as follows:

Count II

I

F. M. Cocke's original Answer and Counterclaim against Buyers, filed June 23, 1969, which counterclaim Buyers answered on June 30, 1969, is incorporated herein by this reference. The real estate contract between Sellers and Buyers, and the escrow agreement with Transamerica, were consolidated into a single multi-party contract by a provision in each, thereby making Sellers' agreement to sell, and Buyers' agreement to buy, subject to all the terms and conditions of the escrow agreement with Transamerica, including the cancellation provisions, paragraphs 16-25. Paragraph 24 actually made Transamerica the dominant party to

the contract, since Buyers, as well as Sellers, thereby gave Transamerica the right to put an end to the consolidated contract without consulting either Buyer or Seller. Under paragraph 24 Transamerica had and has the right to in effect cancel the entire contract at will by (1) simply refusing as escrow agent (for any reason other than cancellation under paragraphs 16-23) to comply further with the escrow instructions, or (2) simply refusing as title insurer to issue its title policies.

II

Answering paragraph II, admits that at the time said consolidated contract was entered into Buyers mentioned apartments, but denies that this defendant was informed of a planned shopping center or of industrial development except for a buffer strip along 52nd Street. Alleges this defendant has received no notice from this City of Tempe that the property has been zoned other than single family residence, denies the remaining allegations of paragraph II.

III

Answering paragraph III, admits that Buyers, in connection with their long delayed releases must have incurred expense in connection with their planned use of the land, as did Sellers in their planned use of the money, but has no knowledge of Buyers' plans other than their descriptions of the release parcels. Alleges that any development by Buyers must await their new plans, if their earlier ones are no longer usable. Denies

that this defendant promised to convey title to Buyers except upon the terms and conditions contained in the consolidated contract. Denies the remaining allegations of paragraph III.

IV

Answering paragraph IV admits that since the aforesaid consolidated contract was entered into costs of construction and many other things, including replacement of farm land, have increased and probably will continue to increase, if quoted in United States dollars. Denies that Buyers are able to predict the exact amount of future inflation. Denies that this defendant promised to convey title to Buyers except upon the terms and conditions contained in the consolidated contract. Denies the remaining allegations of paragraph IV.

V

Answering paragraph V, admits that for many months since the aforesaid consolidated contract was entered into interest rates remained at a high level, but alleges that Buyers did not offer to raise the interest to be paid to Sellers under such consolidated contract. Denies the remaining allegations of paragraph V.

VI

Answering paragraph VI, denies that any delay at all in Buyers' planned development, after this defendant received notice on March 5, 1969 that their release parcel descriptions had finally been delivered into escrow, has been caused by

act or failure to act of this defendant except as provided for in said consolidated contract and thereby approved in advance by Buyers. Denies that Buyers will be able to prove at the trial the exact amount of past and future rents and profits now unknown to Buyers, as they have alleged. As an affirmative defense this defendant alleges that the attempt by Buyers and the escrow officer to secure on March 5, 1969, this defendant's signature on the warranty deed to Parcel 2A and a half-interest in Parcel 1A, which parcels Buyers and the escrow officer well knew were not part of any contract and to which parcels Buyers and the escrow officer well knew this defendant did not have title, which attempt was ratified and confirmed by Buyers' written demand for warranty deeds to such Parcels contained in their letter of escrow instructions dated March 5, 1969, was for the purpose of delaying the escrow, to forestall the accrual of interest on the balance due at about $85,00 per day. Alleges that by such attempt and demand, not yet retracted, Buyers repudiated the consolidated contract. Denies the remaining allegations of paragraph VI.

VII

Denies that plaintiff Buyers have paid, or have agreed since March 5, 1969 to pay, the amounts provided in the consolidated contract to be paid by Buyers. Denies that this defendant promised to convey title to Buyers except upon the terms and conditions contained in the consolidated contract. Denies that Buyers' alleged additonal costs and loss

of use of money was or is due to any failure of this defendant to comply with the escrow instructions approved by all parties to the consolidated contract. Denies the remaining allegations of paragraph VII.

VIII

Answering paragraph VIII admits plaintiffs have employed attorneys, but denies that such employment was necessary or was occasioned by any failure of this defendant to comply with the terms and conditions of the consolidated contract. Denies the remaining allegations of paragraph VIII.

IX

Answering paragraph IX, admits, as alleged, that Buyers have never taken possession of the subject property. Alleges that Buyers' failure to take possession has been and now is still occasioned by the continuing unwillingness of Transamerica to close the escrow and deliver the deeds and title policies to Buyers in accordance with Buyers' new demands, which were not part of any contract. Denies the remaining allegations of paragraph IX.

That by way of affirmative defense, this defendant alleges as follows:

No longer ago than January 24, 1972, Transamerica expressed to the Court of Appeals its continued unwillingness to (a) close the escrow by cancelling the consolidated contract in compliance with the escrow instructions agreed to by all

parties, or to (b) close the escrow and deliver the deeds and its title policies to Buyers in compliance with Buyers new escrow instructions contained in their letter to the escrow agent dated March 5, 1969.

That on January 24, 1972, then, Transamerica had not yet delivered, and remained unwilling to deliver, the deeds and title policies to Buyers upon the terms and conditions specified by Buyers in their new set of escrow instructions. Obviously, there has been no delay due to "failure to convey" in accordance with the consolidated real estate contract and escrow instructions on the part of this defendant. That the delay, if any, repeatedly alleged by Buyers in their amendment as caused by "defendants' failure to convey", has been delay caused by Transamerica's failure to close the escrow and deliver the deeds and title policies to Buyers in accordance with Buyers' new demands. That it is Transamerica, not this defendant, which as escrow agent now holds the deeds in escrow, and which as title insurer is unwilling to insure title in Buyers, since unwilling to risk about a half million dollars on such title insurance on Buyers' theory that to close the escrow in accordance with their new escrow instructions would not violate the escrow instructions earlier agreed to by all the parties.

It has been this unwillingness on the part of Transamerica to deliver the deeds and title policies to Buyers, not any act or failure to act of this defendant, that has kept the agreement in the executory stage, since Buyers have never been able

to take legal possession of the subject property under valid deed and insured title. Unless and until Buyers have taken legal possession, any attempt at construction would, of course, constitute merely trespass.

X

That as affirmative defense this defendant further alleges:

Buyers' original Complaint alleged that F. M. Cocke wrongfully refused to execute partial releases of mortgages, and also that F. M. Cocke refused to execute the deed required to be executed by him. However, it is now admitted that F. M. Cocke's deeds were delivered into escrow at least a month before Buyers delivered the twenty-five releases, and that F. M. Cocke executed the releases immediately upon notice that they had been delivered to escrow, on March 5, 1969.

That pursuant to Rule 15b of the Rules of Civil Procedure, the plaintiffs' complaint should have been amended to conform to the above undisputed evidence.

XI

That as a further affirmative defense this defendant points out that Transamerica Title Insurance Company has never been joined as a defendant in plantiffs' action for specific performance and consequently this Court has no jurisdiction over the subject matter of plaintiffs' complaint.

Respectfully submitted this
22nd day of February, 1972,

JOHNSON SHELLEY ROBERTS & RIGGS

By L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
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F. M. Cocke
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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 F. M. COCKE'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW Filed: February 23, 1972

As provided by 16 ARS Rule of Procedure 52(a), defendant Francis M. Cocke hereby requests that the Court find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment, all in writing, on the answers to the questions set forth below, such answers being necessary to the proper determination of the period of time during which the damages claimed by plaintiff Buyers, for delay in their planned development claimed by Buyers to have been wholly

caused by F. M. Cocke, could have accrued. This request is an addition to F. M. Cocke's Request for Findings of Fact and Conclusion of Law filed January 17, 1972, and will therefore begin with number "5".

5. As a matter of fact and law, whether or not F. M. Cocke promised to convey title to Buyers except upon the terms and conditions contained in the consolidated real estate contract and escrow agreement with Transamerica and in the trustee Bank's instructions, and if so, by what instrument, and the date thereof.

6. As a matter of fact and law, whether or not the attempt on March 5, 1969 by Buyers and the escrow officer to secure F. M. Cocke's signature on the deed which included Parcels 2A and a half-interest in Parcel 1A was in accordance with the consolidated contract or any other contract.

7. As a matter of fact and law, whether or not under the consolidated contract F. M. Cocke was bound to secure the zoning for the various uses proposed by Buyers, and whether or not construction of apartments, shopping center and industrial buildings could begin without a change in the zoning of the subject property.

As a matter of fact, if Buyers' earlier plans for development are no longer usable, as alleged by Buyers, whether or not any development by Buyers must await their new plans.

8. As a matter of fact and law, whether Transamerica or F. M. Cocke was, under the consolidated real estate

contract, and escrow agreement, the escrow agent and title insurer chosen by Seller and Buyer, and, if Transamerica, whether or not it was charged with the duty of the safekeeping and delivery, or redelivery or return, of the deeds delivered into escrow by the trustee bank and F. M. Cocke, all in accordance with the terms and conditions expressed in the consolidated contract of October 9, 1968 and with the terms and conditions expressed in the letter of instructions from the trustee Bank accompanying the delivery into escrow of its deed about October 25, 1969.

9. As a matter of fact and law, whether or not by paragraph 24 of the printed escrow form Buyers as well as Sellers gave Transamerica the right as escrow agent to put an end to the entire consolidated contract without consulting either Buyers or Sellers by (1) simply refusing as escrow agent (for any reason other than cancellation under paragraphs 16-23) to comply with the escrow instructions, or (2) simply refusing as title insurer to issue its title policy.

10. As a matter of fact and law, whether or not Transamerica was on January 24, 1972 and February 22, 1972 willing to close the escrow and deliver the deeds and title policies to Buyers in accordance with Buyers' new set of escrow instructions contained in their letter dated March 5, 1969.

11. As a matter of fact and law, the specific act or failure to act of F. M. Cocke, if any, which caused the claimed delay in Buyers' development, and the date thereof, and whether or not such act or failure to act was in accordance

with the consolidated contract and the trustee Bank's escrow instructions and therefore approved in advance by Buyers.

12. As a matter of fact and law, the specific provision of the consolidated contract or of the trustee Bank's escrow instructions which provided for or approved items (1), (2), (3), (4), and (5) of 4a above, as required by Buyers' letter of escrow instructions dated March 5, 1969.

13. As a matter of fact and law, whether or not Buyers were legally in a position to begin construction before taking legal possession of the subject property under valid deed and insured title.

Respectfully submitted this 23rd day of February, 1972.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 F. M. COCKE'S ADDITIONAL REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW Filed: February 28, 1972

As provided by 16 ARS Rule of Procedure 52(a), defendant Francis M. Cocke hereby requests that the Court find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment, all in writing, on the answers to the questions set forth below, such answers being necessary to the proper determination of the period of time during which the damages claimed by plaintiff Buyers, for delay in their planned development claimed by

Buyers to have been wholly caused by F. M. Cocke, could have accrued. This request is an addition to F. M. Cocke's Request for Additional FIndings of Fact and Conclusions of Law filed February 23, 1972, and will therefore begin with number "14."

14. As a matter of fact and law, whether (1) Transamerica, as escrow agent and therefore a trustee, (2) the trustee First National Bank of Arizona, or (3) the trust remaindermen, not being before the court in Cocke vs. Cocke, are bound by any part of the decision therein made.

15. As a matter of fact and law, whether (1) Transamerica, as escrow agent and therefore as trustee, (2) the trustee First National Bank of Arizona, or (3) the three trust remaindermen are bound by the trial judge's ruling in favor of Buyers on their complaint for specific performance of the consolidated contract, and subject to further orders of the trial judge in connection with such ruling.

Respectfully submitted this 28th day of February, 1972.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
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48 North Macdonald Street
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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation, M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

DEFENDANT F. M. COCKE'S REJOINDER TO PLAINTIFFS' REPLY OF JULY 26, 1972,
and
DEFENDANT F. M. COCKE'S OBJECTIONS TO AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SECOND AMENDED JUDGMENT LODGED JULY 26, 1972.

Filed: August 1, 1972

REJOINDER TO PLAINTIFF BUYERS' REPLY OF JULY 26, 1972

I.

In their Reply Plaintiff Buyers state that with their Second Amended Judgment and Amended Findings of Fact "all complaints of substance made by Defendant F. M. Cocke are dispelled," but the accuracy of such statement is not conceded by F. M. Cocke.

Buyers themselves also state that in F. M. Cocke's objections to Plaintiffs' Amended Judgment he sought to raise old arguments which time and again have been conceded and have been rejected by the Court. Since it is beyond the province or power of the Court to rewrite the actual agreement entered into by the parties, specific performance of which was granted December 8, 1970, or rewrite Buyers' letters of March 5 and

March 26, 1969, or rewrite several of the Rules of Civil Procedure, as proposed by Buyers, the Amended Judgment and the Second Amended Judgment are beyond the province or power of the Court, for the reasons set forth in F. M. Cocke's Objections I through VII to such proposed Judgments. Both of the Amended Judgments are based on an impliedly alleged but nonexistent agreement by Sellers "to convey" regardless of Buyers' admitted failure to perform as agreed.

It should not be overlooked that none of plaintiff Buyers' papers filed July 26, 1972, were verified.

DEFENDANT F. M. COCKE'S OBJECTIONS TO AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FORM OF SECOND AMENDED JUDGMENT LODGED JULY 26, 1972

Inasmuch as plaintiff Buyers' Amended Proposed Findings of Fact and Conclusions of Law as separately filed (except for Findings Nos. 9, 10, 11 and 14) are incorporated into their proposed Second Amended Judgment, defendant F. M. Cocke's objections to all such Findings and Conclusions are incorporated into the following objections to the form of such proposed Judgment lodged July 26, 1972. In Findings of Fact Nos. 9, 10, 11, and 14, the words "perform the agreement for the purchase and sale and," which are included in the Amended Judgment and in the Second Amended Judgment, are omitted in the Amended Proposed Findings separately filed.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH THE COURT'S

MINUTE ORDER GRANTING SPECIFIC PERFORMANCE

A first and fundamental objection to the proposed Judgment is that it is in violent conflict with the Court's Minute Order of December 8, 1970, granting specific performance of the consolidated real estate and escrow agreement, a copy of which was attached by plaintiff Buyers to their original Complaint as a part thereof. It is obvious, as pointed out in the following subparagraph No. 1, that Buyers are now attempting to establish that the consolidated real estate and escrow agreement entered into by Sellers, Buyers, and Transamerica, for the sale and purchase of the land, included a provision that Sellers were to convey the land to Buyers regardless of the admitted failure of Buyers to comply with the terms of the agreement. However, Buyers' new position is clearly untenable, since there is no way to read such a provision into the agreement. A copy of the actual agreement entered into, the specific performance of which was sought by Buyers and granted by the Court, is attached hereto as Exhibit A.

1. The proposed Second Amended Judgment refers in Findings of Fact Nos. 9, 10, 11, and 14, and in Conclusion of Law No. 2, to F. M. Cocke's failure or refusal "to convey".

But where is the provision, express or implied, by which either of the Sellers agreed "to convey" any land at all to Buyers except upon performance by Buyers of their obligations?

The answer to this question is that there was and is no such provision, and

that the actual agreement entered into, which was the agreement the specific performance of which was granted by the Court, required of Sellers only that they deliver their deeds into escrow, which they did long before Buyers saw fit to even partially comply by delivering their release description into escrow for Sellers' signatures.

The first paragraph of the preliminary agreement specifies:

> THIS AGREEMENT made and entered into this 9th day of October, 1968, between JAMES STEWART COMPANY, Buyer, and JOAN H. COCKE and FRANCIS M. COCKE, Sellers, and together with that certain Escrow Agreement No. 02013111-7 entered into with Transamerica Title Insurance Company, signed by the same parties, a copy of which is attached hereto and by reference made a part hereof, constitutes the full agreement between the parties for the purchase and sale of approximately 124 acres of land, being that part of the SE 1/4 of Section 20, Township 1 North Range 4 East, G&SRB&M, lying north of the right-of-way of the Jenkins Ditch, Except a parcel of 3-5 acres containing certain improvements of the Seller Francis M. Cocke situated at the northeast corner of the property, north of the George Ditch.

Schedule A, attached to the escrow agreement, or escrow instructions, as a part thereof, includes:

> These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

Paragraphs 1 and 7 of the fine print escrow instructions specify that:

> SELLER:
> 1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.
>
> SELLER AND BUYER:
> 7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

It is clear from the above provisions (1) that the proposed sale and purchase was subject to its consummation under the terms of the escrow agreement, (2) that Sellers were bound only to deliver their deeds into escrow, and (3) that delivery thereof was to be made by the escrow agent to Buyers upon actual performance by them (not merely expressions of willingness to perform) of the terms of the escrow agreement. It is well settled that expressions by a party to an escrow agreement of willingness and ability to comply with the escrow

instructions are immaterial to the question of actual compliance. 28 Am Jur 2d 13, Escrow, Sections 21, 22, 24. The ability of a party to perform the escrow agreement cannot, without actual full performance, amount to compliance. 30A CJS, Escrows, Sections 10(a) and 10(b), and cases cited.

Under the heading CANCELLATION, fine print paragraphs 16-22 include:

> CANCELLATION:
> 16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.
>
> 17. When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notice of Demands or Declarations.
>
> 18. In the event said other party shall fail within said thirteen-day period to comply with all of the terms hereof, these instructions

shall become cancelled and Escrow Agent is thereupon authorized;

19. First: To pay to the party electing to cancel, any earnest money deposited hereunder by said other party, after deducting any charges;

20. Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;

21. Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid:

22. Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of the Escrow Agent. (emphasis added)

It is not disputed that on March 5, 1969 F. M. Cocke filed his 13-day notice of election to cancel upon the continued failure of Buyers to comply, as provided for by paragraphs 16-22. Nor is it disputed that Buyers have never complied.

Under the heading CANCELLATION, fine print paragraph 24 specifies:

CANCELLATION:
24. If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Transamerica Title

> Insurance Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow Agent shall be returned to the parties who executed said documents.
> Mutually executed instruments shall be retained by Escrow Agent.

Upon Transamerica's unwillingness to issue its title policies, which unwillingness has been exhibited by it for nearly three years, and was specifically admitted before the Court of Appeals, the escrow was clearly cancelled, as agreed to in advance by Buyers, under the self-executing and mandatory language of fine print paragraph 24.

It is well settled that where a contract states grounds upon which a party may rescind or cancel it, the contract controls as to such grounds.
17 Am Jur 2d 969, Contracts, Section 495.

Under the heading DEFINITIONS, fine print paragraph 43 specifies:

> DEFINITIONS:
> 43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

This paragraph makes it clear that since

only Transamerica could make the decision that it would issue its title policy, only Transamerica could close the escrow, which was the relief sought by Buyers' action for specific performance. But since Buyers failed to join Transamerica, they left the Court without jurisdiction to grant such relief, as further discussed under IV, below.

II.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH THE UNDISPUTED FACTS

1. At page 3, line 25, in Finding of Fact No. 4, Buyers admit that the agreement provided that the unpaid balance was to be secured by plaintiffs' notes and mortgages, but omit the undisputed fact that in Buyers' letter dated March 5, 1969 they demanded that the escrow agent close the escrow and record the deeds to Buyers, subject to mortgages to be simultaneously recorded totalling $84,000 less than the balance due, as discussed below under subparagraph 3.

2. Finding of Fact No. 6 fails to mention the undisputed fact that Buyers took back, and still hold, the $20,000 earnest money paid to Sellers upon the signing of the contract, by Buyers' removal from the escrow officer's desk, and their continued retention of, the $40,000 note and mortgage deposited into escrow by F. M. Cocke on or about January 10, 1969, in exchange for and as double security for the $20,000 in escrow funds received by him at that time.

3. In Finding of Fact No. 7,

plaintiff Buyers state that they have been ready at all times to close this transaction since December 15, 1968.

However, it is not disputed that, as mentioned above, Buyers' 25 release descriptions were not made available for F. M. Cocke's signature until March 5, 1969.

Nor is it disputed that by Buyers' letter of instructions to the escrow agent dated March 5, 1969, they made a number of new demands, all of which were and are in conflict with the terms of the escrow agreement.

It is not disputed that Buyers' letter instructed the escrow agent to:

(1) Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions accompanying the delivery of its deed into escrow in October, 1968.

(2) Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

(3) Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

(4) Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers. Neither the trustee Bank nor F. M. Cocke ever executed any deeds to

Parcels 1A or 2A, either quit-claim or warranty, since neither had title. Such parcels were for that reason specifically excluded from the land agreed to be sold, and were not the subject of any contract.

In a second letter to the escrow agent dated March 26, 1969, Buyers claimed that the position taken by them in their letter of instructions to the escrow agent dated March 5, 1969 amounted to compliance. Marked copies of these letters are attached as Exhibit B.

Further, it is not disputed that Buyers have never retracted these new demands, which constituted a repudiation of the agreement. In Equitable Trust Co. of New York v. Denver and R. G. R. Co. v. Western Pac. R. Co. (1917) 244 F2d 485, affirmed CCC, 2d (1918) 250 F 327, cert. den. (1918) 246 U.S. 672, 62 L.ed 932, 38 S. Ct. 432, Hand, District Judge, said:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. This is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

4. In Finding of Fact No. 8, plaintiffs state that defendant Joan H. Cocke has been ready to perform since December 15, 1968 and thereafter.

However, it is not disputed that Joan H. Cocke joined with F. M. Cocke in

instructing the trustee Bank, by the letter dated October 10, 1968, prepared by her attorney, to deliver into escrow its trustee's deed to the half-interest then held by it in Parcel 1 along with the instruction to the escrow agent that the proceeds therefrom would be controlled by Joan H. Cocke and F. M. Cocke. Neither is it disputed, as testified to by Joan H. Cocke's attorney, Loretta Whitney, that in February, 1969, Joan H. Cocke repudiated her agreement as to joint control of such proceeds. Nor is it disputed that she was joined by Buyers and the escrow agent in the unsuccessful attempt to in effect rewrite the trustee Bank's escrow instructions, earlier approved by all parties, so as to delete the specification contained therein as to joint control, and pay such proceeds to Joan H. Cocke.

5. In Findings of Fact Nos. 9, 10, 11, and 14, Buyers speak of F. M. Cocke's refusal or failure to perform the agreement for purchase and sale, but have never specified the particular act or failure to act which constituted such claimed refusal or failure. It is not disputed that, in accordance with fine print paragraph 1 of the escrow instructions (discussed above), F. M. Cocke's deeds to Parcel 2 and the half-interest in Parcel 1 were timely delivered into escrow. Such deeds contain the same Brown Engineering land descriptions which Buyers now approve on pages 1 and 2 of their proposed Second Amended Judgment, except that Buyers have omitted the clause subjecting the land to rights of way for roads, ditches and public utilities.

6. Buyers have never offered one shred of evidence that their claimed "preliminary costs," mentioned in Findings of Fact Nos. 11 and 12, and Conclusion of Law No. 2, were within F. M. Cocke's contemplation at the time the agreement was entered into. It is undisputed that it was Buyers themselves who chose to incur their claimed preliminary costs and then refused to perform as agreed by insisting on the new demands made in their letter dated March 5, 1969.

7. In Finding of Fact No. 13, Buyers admit that on December 8, 1970, the Court granted specific performance of the consolidated agreement entered into on October 9, 1968, by Sellers, Buyers and Transamerica, a copy of which was attached to Buyers' Complaint for Specific Performance, and a copy of which is also attached to these Objections. The Court granted specific performance of the agreement, not Buyers' letter dated March 5, 1969.

As pointed out in Jonas v. Leland, 77 Cal. App. 2d 770, 176 P.2d 764, one of the cases relied on by Buyers in their Post Trial Memorandum:

> Equity enforces performance of a contract only as it is made; a court has no power to make a new contract.

III.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH RULES OF CIVIL PROCEDURE 12(b)7, 19(a) and 19(c), AS AMENDED, CONCERNING INDISPENSABLE PARTIES

It is clearly not within the province

or power of the Court to rewrite the actual agreement entered into by Sellers, Buyers, and Transamerica so as to alter any of its provisions or take out either a provision or a party. Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, infra. Since an escrow agent is undeniably an indispensable party to an escrow agreement, it must follow that Transamerica remains under the terms of the escrow agreement actually entered into an indispensable party to any adjudication of the mutual rights and obligations of Sellers and Buyers under such escrow agreement.

It is clear that the 1969 amendment to Rule 19 did not relax the rule where joinder of the additional party, needed for just adjudication between those already joined is feasible.

In Provident Tradesman's Bank & Trust Co. v. Patterson, 390 U.S. 102, 19 L.ed 2d 936, 88 S. Ct. 733 (January, 1968), in discussing Rule 19 and cases relied on by the lower court in dismissing a complaint in the absence of an indispensable party, the court said at page 951 of 19 L.ed 2d:

> The first of the cases was Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599, in which, in essence, the plaintiff sought specific performance of a contract to convey land, but sought it not against his vendor (who could not be joined) but against a person who claimed through an entirely different chain of title. The Court saw that any declaration of rights between the parties before it would either

purport (incorrectly) to determine the validity of plaintiff's contract with his grantor, or would decide nothing. The Court said, in language quoted here by the Court of Appeals:

'In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . . We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . . We put it on the ground that no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.'

Nothing in this language is inconsistent with the Rule 19 formulation, or otherwise suggests that lower courts are expected to proceed without examining the actual interest of the nonjoined person. As the Court explicitly stated, there is no question of "jurisdiction" and there can be no binding adjudication of a person's rights in the absence of that person. Rather, the problem under the circumstances was that the substantive involvement of the grantor was such that in his absence there was nothing for the Court to decide.
(emphasis added)

In Mallow v. Hinde, as in this instant case, executory agreements were before the court, but, also as in this case, without all of the parties whose mutually dependent rights and obligations would have to be determined. In Mallow v. Hinde, the court upheld dismissal of the complaint, even though the absent party could not be joined.

As pointed out in the Provident Tradesman's case, there was nothing in the language quoted from Mallow v. Hinde that was inconsistent with the Rule 19 formulation, or otherwise suggested that lower courts are expected to proceed without examining the actual interest of the nonjoined person.

IV.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH RULES OF CIVIL PROCEDURE 12(b) 6 and 12(b) 1

Since the escrow agent was not joined by Buyers, their Complaint seeking specific performance of the consolidated agreement failed to state a claim upon which the relief sought could be granted, such relief requiring jurisdiction over the escrow agent in order to enforce the obligations assumed by it. Without the jurisdiction to grant the relief sought, the Court was and is left without jurisdiction over the subject matter of Buyers' Complaint. 21 CJS, Courts, Sections 26, 35b; Cooper v. Reynolds, 10 Wall 308, 316, 19 L.ed 931. A court cannot render a valid judgment without jurisdiction to grant the relief sought. 49 CJS, Judgments, Sections 19a, 19c, 19d; Varnes v. White, 40 Ariz. 427, 12 P.2d 879; Wall v. S. Ct. of Yavapai Co.,

53 Ariz. 344, 89 P.2d 624; Hill v. Favour, 52 Ariz. 561, 84 P.2d 575; Arizona Land & Stock Co. v. Markus, 37 Ariz. 530, 296 P. 251; Western Land & Cattle Co. v. National Bank of Arizona at Phoenix, 29 Ariz. 51, 239 P. 299.

V.

THE PROPOSED SECOND AMENDED JUDGMENT IS IN CONFLICT WITH RULE OF CIVIL PROCEDURE 52(a) PROVIDING FOR MANDATORY FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 17, February 23, and February 28, 1972, this defendant requested findings of fact and conclusions of law as provided by Rule of Civil Procedure 52(a).

In their proposed Second Amended Judgment, plaintiff Buyers have ignored such requests, in violation of Rule 52(a). All of these requests were made before trial, which began February 28, 1972, at 10:09 a.m.

VI.

NO COURT ORDER TO CONVEY

Any statements in Finding of Fact No. 14, or elsewhere, that F. M. Cocke was ordered to convey by the Court, are in error. What was ordered by Minute Order of December 8, 1970 was specific performance of the consolidated real estate and escrow agreement, including its provisions for cancellation under fine print paragraphs 16-22 and 24.

VII.

THE PROPOSED SECOND AMENDED JUDGMENT IS BEYOND THE JURISDICTION OF THE COURT

The Second Amended Judgment proposed by plaintiff Buyers in effect rewrites the actual agreement entered into, as admitted by the judgment itself at page 9, line 1, thereof. Buyers propose the deletion from the actual agreement of the rights and duties assumed thereunder by Transamerica, which deletion, like the insertion of a provision requiring Sellers "to convey," is not within the province or power, or jurisdiction, of the Court.

As pointed out in a unanimous decision by the Supreme Court, sitting en banc, in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318:

> It is not within the province or power of the court to alter, revise, modify, extend, re-write or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc., v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

Included in Buyers' proposed deletion are fine print paragraphs 1, 7,

16-22, 24 and 43 of the fine print escrow instructions, which are quoted hereinabove, beginning at page 4. Paragraphs 1 and 7 will bear repeating here:

> SELLER:
> 1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.
>
> SELLER AND BUYER:
> 7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

It cannot be denied that the intent of Sellers, Buyers and Transamerica is here expressed in clear and unambiguous language. Paragraphs 16-22, 24, and 43 are equally clear.

In proposing the deletion of these paragraphs, and others, Buyers are asking the Court to go beyond the limits of its power or jurisdiction, and so beyond the limits of due process. In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S. Ct. 236, the court pointed out, quoting Scott v. McNeal, 154 U.S. 34, 46, 38 L.ed 896, 901, 14 S. Ct. 1108, that no judgment of a court is due process of law, if rendered without jurisdiction in the court.

JOHNSON SHELLEY ROBERTS & RIGGS

By /s/ L. Alton Riggs, Jr.
Attorneys for F. M. Cocke

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

FRANCIS M. COCKE being first duly sworn, on oath deposes and says:

That he is one of the defendants in the foregoing entitled and numbered cause; and that he has read the foregoing instrument and knows the contents thereof, and that the matters and things stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ Francis M. Cocke

Subscribed and sworn to before me this 1st day of August, 1972.

/s/ Irene Millsaps
Notary Public

My Commission Expires:

9-30-75

BUYERS' REPLY TO DEFENDANT F. M. COCKE'S OBJECTIONS TO AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SECOND AMENDED JUDGMENT LODGED JULY 26, 1972

ORAL ARGUMENT REQUESTED

Filed: August 2, 1972

Defendant Cocke's memorandum of objections to Plaintiffs' Second Amended Judgment again raises old arguments which, time and again, have been considered and rejected by the Court. Nothing gainful would be accomplished by repeated rebuttal of those copious arguments.

Respectfully submitted,

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S MOTION TO VACATE THE JUDGMENT OF NOVEMBER 10, 1970, AND THE JUDGMENT OF SEPTEMBER 29, 1972

Filed: October 10, 1972

Comes now defendant-counterclaimant F. M. Cocke and moves the Court to vacate the Summary Judgment of November 10, 1970, in favor of Transamerica, and to vacate the Summary Judgment of September 29, 1972, in favor of plaintiff Buyers, such judgment being void for want of jurisdiction in the Court, for the reasons set forth below.

I.

THE MULTI-PARTY ESCROW AGREEMENT

On October 9, 1968, Sellers, Transamerica as escrow agent, and Buyers entered into an escrow agreement for the proposed sale and purchase through the escrow of two parcels of land, designated as Parcels 1 and 2. The provisions of Transamerica's printed escrow form are parts of the agreement. Schedule A, attached to the printed form as part of the agreement, specifies:

These instructions and that certain

> Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

The printed escrow form includes the following provisions:

Paragraph 1 provides:

> SELLER:
> I. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.
> (emphasis added)

Paragraph 14 provides:

> SELLER AND BUYER:
> 14. Direct that when these instructions have been complied with and Transamerica Title Insurance Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver for filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein at which time Escrow Agent shall disburse all funds paid to it hereunder, as

provided herein.

Paragraph 43 provides:

43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

The printed form also includes the following provisions:

Paragraph 7 provides:

SELLER AND BUYER:
7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon therafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

And under the heading "CANCELLATION":

16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

17. When such written notice is delivered to Escrow Agent by the

party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, Demands or Declarations.

18. In the event said other party shall fail within said thirteen-day period to comply with all of the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized: . . .

24. If Escrow Agent is unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow Agent shall be returned to the parties who executed said documents. Mutually executed instruments shall be retained by Escrow Agent.

(emphasis added)

Undeniably, the whole thrust of the escrow agreement, as plainly spelled out therein, was the delegation by Buyers and Sellers to the escrow agent, and the

assumption by the escrow agent, of the right and duty either (1) to close the escrow and deliver the deeds and title policies to Buyers upon performance by Buyers under paragraph 1, 14 and 43, or (2) to cancel the escrow upon Buyers' failure to perform, under paragraphs 16, 17 and 18, or, under paragraph 24, upon the escrow agent's unwillingness to perform or Transamerica's unwillingness to issue the title policies.

The courts insist on the strict performance of an escrow agent's duties by the escrow agent itself. It is well settled that Transamerica as escrow agent was and is absolutely bound to perform, as a trustee, the duties delegated to it by Sellers and Buyers and voluntarily assumed by it, as spelled out by the escrow agreement and instructions.

28 Am Jur 2d, Escrow, in Section 16 discusses the duties and liabilities of an escrow agent, and points out that:

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed.

As briefly stated in Higgins v. Kittleson, 1 Ariz. App. 244, 401 P.2d 412 (1965):

> The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co.

> v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).

As stated in Tucson Title Insurance Co. v. D'Ascoli:

> An escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation.

II.

THE ATTEMPT TO SECURE A WARRANTY DEED TO LAND NOT OWNED BY SELLERS

After delivery into escrow, by the broker, of F. M. Cocke's deeds to Parcel 2 and his half-interest in Parcel 1 on or about December 31, 1968, the close of escrow was delayed solely by Buyers' continued failure to complete their descriptions of the 25 five-acre releases of mortgage provided for by Schedule A of the agreement. These 25 releases were finally completed and delivered into escrow, and were submitted by the escrow officer, at the escrow office, to F. M. Cocke for his signature on March 5, 1969. He signed the 25 releases, but refused to

sign the 26th document in the stack submitted to him. This last document was a warranty deed which included Parcels 1A and 2A, a long narrow strip of land containing a large drainage canal, the Jenkins Ditch, which abuts the south boundary of Parcels 1 and 2, and provides drainage. The Cockes had never acquired title to the land in the canal right of way. It was for that reason specifically excepted from the land proposed to be sold, by the property descriptions attached to the escrow agreement, and was not the subject of any contract. Upon questioning, the escrow officer stated that Buyers had prepared and delivered the deed into escrow for his (F. M. Cocke's) signature along with the releases. F. M. Cocke thereupon signed and delivered into escrow, on a form furnished by the escrow officer, a notice of intention to cancel as provided by paragraph 16 of the escrow agreement.

III.

BUYERS' LETTER OF NEW DEMANDS
NOT PART OF THE AGREEMENT

It is not disputed that the Buyers' letter dated March 5, 1969, to Transamerica as escrow agent, and enclosing two personal checks for $32,000 each, dated March 7, 1969, and notes and mortgages totalling about $420,000, directed the escrow agent to:

ITEM 1. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions accompanying the

delivery of its deed into escrow in October, 1968.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, as the annual payment which entitled Buyers to their first releases.

By letter of March 10, 1969, the escrow agent enclosed a copy of Buyers' letter dated March 5, 1969, and announced to Sellers that Buyer had done everything required of him to close the escrow.

The documents and demands contained in Buyers' letter to the escrow agent dated March 5, 1969, plainly show that the letter constituted a written refusal by Buyers to comply with the terms set forth in the escrow agreement. In a second letter to the escrow agent dated March 26, 1969, Buyers claimed that the deposit of such documents and demands met all requirements on the part of Buyers. Clearly, Buyers did not even attempt to comply with

the actual terms of the escrow agreement within the 13-day period following the filing on March 5, 1969, of F. M. Cocke's notice of intention to cancel. Buyers have never retracted their new demands in the manner required by paragraph 11, or in any other manner. Further, Buyers' insistence that such new demands be met, as a condition to close of the escrow, constituted, without more, a repudiation of the agreement. In Equitable Trust Co. of New York v. Denver and R. G. R. Co. v. Western Pac. R. Co. (1917) 244 F.2d 485, affirmed CCC, 2d (1918) 250 F 327, cert. den. (1918) 246 U.S. 672, 62 L.ed 932, 38 S. Ct. 432, Hand, District Judge, said:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. This is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

IV.

BUYERS' FAILURE TO JOIN THE ESCROW AGENT

This litigation began with plaintiff Buyers' Complaint, filed in April, 1969, as C-222472, For Specific Performance of the escrow agreement, a copy of which was attached to the Complaint. The Complaint itself admits the delegation to and assumption by Transamerica of the escrow agent's duties, by demanding that the

title insurance policies be issued, that the escrow be ordered closed, and that Transamerica be ordered to release the mortgages on the five-acre tracts upon future payments as provided. Notwithstanding these demands, Buyers failed to join Transamerica as a party to their action, so leaving the Court without jurisdiction to grant the relief sought and so without jurisdiction over the subject matter of Buyers' Complaint, requiring its dismissal under Rule 12 (i) 3, as amended. Cooper v. Reynolds, 10 Wall (U.S.) 308, 316, 19 L.ed 931; 21 CJS, Courts, Sections 26 and 35(b).

It is not disputed, nor could it be, that only a single multi-party escrow agreement was entered into by the parties.

An examination of Schedule A and the printed portion of the escrow agreement establishes beyond question that Seller, Escrow Agent, and Buyer were and are each an indispensable party to such escrow agreement, and that their rights and obligations were and are mutually dependent. In the absence of any one of such three parties, there could have been no escrow agreement at all between the other two. Likewise, in the absence of any one of such parties, ther could be no enforcement of such mutually dependent rights and obligations by a court. Rules of Civil Procedure 19(a) and 19(c), as amended. Provident Tradesman's Bank and Trust Co. v. Patterson, 390 U.S. 102, 19 L.ed 2d 936, 88 S. Ct. 733 (Jan., 1968); Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599; State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936); Bolin v. Superior Court, Maricopa County (1959)

85 Ariz. 131, 333 P.2d 295; Siler v. Superior Court, Coconino County (1957) 83 Ariz. 49, 316 P.2d 296.

For these reasons, pursuant to amended Rules 13(a), 13(h), and 18(a), and with leave of court first obtained, F. M. Cocke brought in Transamerica as escrow agent, seeking enforcement of the cancellation provisions of the escrow agreement. Transamerica then counterclaimed in C-222472 against F. M. Cocke, seeking attorney fees by enforcement of paragraphs 8, 9, and 10 of the escrow agreement without regard to its obligations to Buyers and Sellers to either close or cancel the escrow.

V.

SEPARATE PROCEEDINGS FOR ENFORCEMENT OF THE SINGLE ESCROW AGREEMENT

As shown by the record of C-222472, this Court on November 10, 1970, entered its separate summary judgment in favor of the escrow agent, and on December 8, 1970, entered its minute order that Buyers' motion for summary judgment on their Complaint For Specific Performance of the escrow agreement was granted. Following separate proceedings, the separate summary judgment in favor of Buyers was entered on September 27, 1972.

It must be concluded that by the separate summary judgments in favor of the escrow agent and the Buyers, the Court has attempted to alter the single escrow agreement into two separate and independent agreements, one between F. M. Cocke and the escrow agent, and another between F. M. Cocke and the Buyers. This was

completely beyond the Court's jurisdiction.

It has long been settled that a multi-party contract containing mutual convenants on behalf of each party, such as the escrow agreement, cannot be specifically enforced by one party thereto against only one other party thereto, since that would require rewriting the contract. 81 CJS, Specific Performance, Sections 1, 26, 158; 49 Am Jur, Specific Performance, Sections 2, 22, 157, 171.

In Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967), the case relied on by Transamerica to support its claims under paragraphs 8, 9, and 10, the court said:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc., v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is not need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

In Jonas v. Leland, 77 Cal. App. 2d 770, 176 P.2d 764, one of the cases relied on by Buyers, the court briefly stated the universal rule as follows:

> Equity enforces performance of a contract only as made; a court has no power to make a new contract.

49 Am Jur, Specific Performance, Section 171, states:

> In rendering a decree of specific performance, the court has no power to decree performance in any other manner than according to the agreement of the parties. The court should not assume to make a new contract for the parties and then decree its specific performance, or undertake to compel the defendant to do something he did not contract or agree to do, but should enforce the contract in question according to its terms or not at all. Specific performance will not be decreed of something which a party has not agreed to do, in spite of the fact that it is deemed essential to the complete attainment of the benefits or advantages anticipated as a result of the contract.

Clearly, the Court was without jurisdiction to rewrite the escrow agreement so as to delete therefrom Transamerica's obligation as escrow agent to either close or cancel the escrow, and enforce only its claimed rights under paragraphs 8, 9, and 10 of the same agreement.

Further, paragraph 8 itself specifies the time limit within which the escrow agent was authorized by Buyers and Sellers, in the event a demand was made upon it concerning the escrow, to hold the money and documents deposited into escrow without incurring liability and responsibility

for damage suffered by Buyers and Sellers from the delay. Paragraph 8 provides:

> SELLER AND BUYER:
> 8. Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in a court of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.
>
> (emphasis added)

The record shows that such a demand was made by Buyers in their letter of new escrow instructions dated March 5, 1969, and by F. M. Cocke on or about April 3, 1969. Even so, paragraph 8 clearly does not relieve the Escrow Agent of liability and responsibility for holding the money and documents from and after June 23, 1969, when the required action to determine the rights of Seller and Buyer was filed, inasmuch as the escrow agent has not yet deposited the money and documents into court as specified. Obviously, the escrow agent is liable for all damages resulting from this deviation from the terms of the escrow agreement. Tucson Title Insurance Co. v. D'Ascoli, supra.

Since the trial court was also without jurisdiction to extend the time limit specified by paragraph 8, it is clear that the separate summary judgment in favor of the escrow agent was and is a nullity, and that the appellate courts therefore lacked jurisdiction to review it. Quiroz v. Alfaro, No. 2 CA-CIV 1276; Riley v. County of Cochise, 10 Ariz. App. 55, 455 P.2d 1005 (1969). See also Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965) 341 F.2d 514.

Since the escrow agent's obligations under the escrow agreement cannot be deleted, the Summary Judgment of November 10, 1970, was plainly premature. It should have awaited a final judgment which specifies whether the escrow agent is to close or cancel the escrow, with findings of fact and conclusions of law as to whether or not the documents and demands contained in Buyers' letter dated March 5, 1969, constituted compliance by Buyers, and should also have awaited a determination of the damages suffered by Buvers and Sellers by reason of the escrow agent's delay, in closing or cancelling the escrow, beyond the time limit specified by paragraph 8. Clearly, the escrow agent could relieve itself of liability and responsibility, for holding the money and documents beyond the time limit, only by delivering same either to the court, or, by closing or cancelling the escrow, to Buyers and Sellers. Transamerica has so far chosen to do neither.

In F. M. Cocke's affirmative actions to enforce the escrow agreement, he joined both the escrow agent and the Buyers,

as required by Rule 19 discussed above under IV.

The question of whether parties to a multi-party contract, such as the escrow agreement, can separate the enforcement of its mutually binding covenants into separate controversies, with separate judgments, has arisen innumerable times following attempts by one of such parties to remove part of the case from a state to a federal court on the grounds of diversity. In Louisville and Nashville Railroad Co. v. Ide, 114 U.S. 52, 5 S. Ct., 735, 29 L.ed 63, in affirming the circuit court's order remanding the case to the state court in accordance with the established rule, the Court said:

> The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings. Here, it is certain joint contracts, entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible.
>
> It is said, however, that by the New York Code of Civil Procedure, section 1204, "judgment may be given for or against one or more plaintiffs, and for or against one or more defendants," and under this it

> has been held that when several are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are actually liable. The same rule undoubtedly prevails in many other States, but this does not make a joint contract several, nor divide a joint suit into separate parts.

As pointed out in 88 CJS, Trial, Section 9, Necessity or Propriety of Separate Trials of Separate Issues:

> There should be one full and comprehensive trial covering all disputed matters, and parties cannot, as of right, have a trial divided.
>
> Separate trials will be denied where the cases arise out of the same event . . . .

It has long been settled that to proceed in a matter, the Court must have jurisdiction of the subject matter of the case, jurisdiction of the persons involved in the litigation, and jurisdiction to render the particular judgment given. Van Ness v. Superior Court of Maricopa County (1950), 69 Ariz. 362, 213 P.2d 899; Wall v. Superior Court of Yavapai County (1939) 53 Ariz. 344, 89 P.2d 624.

The separate proceedings on Transamerica's counterclaim against F. M. Cocke to enforce paragraph 8, 9, and 10 of the escrow agreement were under Rule 19 beyond the jurisdiction of the Court in the absence of the Buyers, and the separate

proceedings on Buyers' suit against F. M. Cocke for specific performance of the escrow agreement were likewise beyond the Court's jurisdiction in the absence of the escrow agent.

It must therefore be concluded, since the Court did not have jurisdiction to proceed, that Rule 13 (i) did not authorize the separate proceedings or the separate summary judgments against F. M. Cocke on his affirmative action brought against the escrow agent and the Buyers for enforcement of the escrow agreement. The summary judgment in favor of the escrow agent does not even mention the Buyers or their rights or obligations, and the summary judgment in favor of the Buyers admits the escrow agreement but does not mention the escrow agent or its duties.

VI.

DUE PROCESS OF LAW AS PRESCRIBED BY THE RULES OF CIVIL PROCEDURE

In neither of the summary judgments against F. M. Cocke on his affirmative claims against the escrow agent and against the Buyers was there any finding of fact, conclusion of law or decision as to whether Buyers' letter of new demands, and the checks, notes and mortgages delivered into escrow thereby, constituted compliance with the escrow agreement, or a repudiation thereof. Nor was there any finding, conclusion or decision as to whether the escrow agent was bound to either close or cancel the escrow. Clearly, judgment was not rendered upon the whole case or for all the relief asked, since the

questions as to these fundamental and decisive facts were undeniably put in issue by F. M. Cocke in seeking the return of Sellers' deeds, and damages for delay.

However, in violation of Rule 56(d) the Court in neither of the summary judgments ascertained or specified that such material facts existed without substantial controversy.

As to the recent judgment in favor of Buyers, neither the Buyers in making their claim for damages suffered by reason of claimed delay by F. M. Cocke in the closing of the escrow, nor the Court in granting summary judgment in favor of Buyers on their Complaint For Specific Performance of the escrow agreement specified the particular date which marked the beginning of the claimed delay. Without a finding of whether and when Buyers complied with the escrow agreement, so that the escrow could close and Buyers could proceed with their development, and a finding of whether and when F. M. Cocke violated the agreement and so caused the claimed delay, there can be no determination of just when such delay began. As Buyers themselves stated in their letter of March 26, 1969:

> Some action must now be taken to see that this matter is closed so that title can pass to the buyers and they can proceed with their development and obtain releases for the annual payment and for other land as required.

Further, Buyers' Complaint irrevocably demanded that the escrow be closed and the title policies issued, even though Buyers failed to join Transamerica.

In view of these admissions that Buyers' right to begin development must await the close of escrow and the issuance of the title policies, and in the absence of findings that the escrow has actually been closed and the title policies issued, or findings as to how and when F. M. Cocke delayed same, the award of damages for his claimed delay in such development is based on delay over a period of time which has not yet begun.

Prior to the trial on the issue of damages, F. M. Cocke made three requests, as provided by Rule 52(a), for findings of fact and conclusions of law, all of which were and are material to, if not decisive of, the period of time during which the damages claimed by Buyers could have accrued. In violation of Rule 52(a) the requests have been ignored.

The Supreme Court of Arizona, in Fritts v. Ericson, 87 Ariz. 227, 349 P.2d 1107 (1960), held that where the request was made before trial, the special finding of fact and conclusions of law are mandatory.

In United STates v. Aluminum Co. of America, 2 F.R.D. 224 (1941) the court held that the District Court was without authority to dispense with the findings or the conclusions contemplated by the federal rule. (Rule 52.) The Court said:

> Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608,

609, 19 S.Ct. 761, 43 L.Ed. 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 49 S.Ct. 144, 73 L.Ed. 243. See in G. W. Giannini, Inc., 2 Cir., 90 F.2d 445, 447, 448, 111 A.L.R. 1492.

In the present case, as yet, I have not complied with Rule 52. Among the deficiencies are the following: I have made "no formal findings." I have not stated "separately: the court's "conclusions of law." With few exceptions, I have stated "but ultimate conclusions." I have not, -- at least except in a discursive and general way, -- formulated "underlying findings of fact." I have discussed only "portions of the evidence." In great part I have engaged in "reasoning." Neither the discussion nor the reasoning constitutes "special" or "formal" findings. So far I have refrained entirely from going into numerous issues made by the pleadings and have not even mentioned the evidence bearing on them. Nor have I "separately" or "specifically" determined, or even made a partial determination of, "all the issues which the case presents."

For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that,

> in order to obey the rule, as construed by the Supreme Court, -- regardless of the contents of the oral opinion, -- findings must be made and conclusions stated on all issues in the present case.

The fundamental rule as to findings of fact to support a judgment was clearly stated in the early case of Hultberg v. Anderson (1912) 97 N.E. 216, 252 Ill. 607, writ of error dismissed (1914), Anderson v. Swedish Evangelical Mission Covenant of America, 35 S. Ct. 418, 238 U.S. 605, 59 L.ed 1485:

> A judgment pronounced without any judicial determination of the facts which alone can support it is wanting in due process of law and may be impeached.
>
> A judgment pronounced without any judicial determination of the facts which alone can support such judgment is merely the arbitrary edict of the judge, and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons. Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 17 Sup. Ct. 581, 41 L.ed 979; Fayerweather v. Rich, 195 U.S. 276, 25 Sup. Ct. 58, 49 L.ed 193.

It must therefore be concluded that the entry of the two judgements in violation of Rules 56(d) and 52(a) constituted

violations of due process of law, as prescribed by such Rules.

For the reasons set forth above the Judgments of November 10, 1970, and September 27; 1972, should be vacated and set aside for want of jurisdiction in the Court.

Respectfully submitted this
10th day of October, 1972.

By L. Alton Riggs, Jr.
Attorney At Law

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

RESPONSE TO F. M. COCKE'S MOTION TO VACATE THE JUDGMENT OF NOVEMBER 10, 1970, AND THE JUDGMENT OF SEPTEMBER 29, 1972

Filed: October 12, 1972

Plaintiffs, by and through their attorneys undersigned, for their response to F. M. Cocke's motion to vacate the judgment of November 10, 1970 and the judgment of September 29, 1972 move the Court for entry of its order denying said motion. Said response is based upon all the proceedings had herein, including the proceedings had before the Court of appeals in a special action, and upon Memorandum of Points and Authorities attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

Job's lament that there is nothing new under the sun must have been made with the anticipation of this lawsuit in mind. Once again Mr. Cocke has set forth the same tired and stale arguments so consistently and frequently rejected by this Court in every phase of this litigation. It is submitted that by now the Court is painfully aware of Mr. Cocke's contentions, and that the restatement of the same in the form of a motion to vacate judgment

adds nothing new to these proceedings. Therefore, for the reasons set forth in dozens of arguments concerning the same matters raised in this motion, Plaintiffs move that the motion be denied.

Respectfully Submitted,

KELLY AND CORBIN

By Steven H. Schneider
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

RESPONSE TO F. M. COCKE'S MOTION TO VACATE THE JUDGMENT OF NOVEMBER 10, 1970, and the JUDGMENT OF SEPTEMBER 29, 1972

Filed: October 24, 1972

Defendant and counterclaimant, Transamerica Title Insurance Company of Arizona, by and through its undersigned counsel, respectfully respond to the Motion of F. M. Cocke to vacate the Judgment of November 10, 1970, and the Judgment of September 29, 1972, as follows:

The Motion of F. M. Cocke is virtually a photostating of the multiple arguments that have been raised by Mr. Cocke in the trial court, the Court of Appeals, the Superior Court, again in the trial court and on numerous interim occasions. Each of the courts referred to above has judicially considered the arguments and authorities cited by F. M. Cocke and have on each occasion found the contentions of Mr. Cocke to be frivolous and the legal arguments non-persuasive. Suffice it to say that the Motion of Mr. Cocke is in all candor simply a rehash of various arguments that have been made time and time again in these proceedings and have been denied by the various courts

considering them and therefore, the issues sought to be raised by the Motion are without question res judicata. In particular, the Motion requests that the judgment be set aside for lack of jurisdiction, a question which was specifically determined by the Court of Appeals in Cocke v. Transamerica, 494 P.2d 756, and by the Arizona Supreme Court on a writ of special action brought by Francis M. Cocke and heard on June 6, 1972.

It is therefore respectfully submitted that for the reasons set forth in this response and in the numerous responsive pleadings filed by Transamerica Title Insurance Company of Arizona in this matter, that the Motion of Francis M. Cocke to vacate the Judgment of November 10, 1970, as modified on September 29, 1972, be denied and for such other and further relief as the Court deems appropriate.

BROWDER & GILLENWATER, P.C.

By Powell B. Gillenwater
Attorneys for Transamerica Title Insurance Company of Arizona

Supreme Court, U. S.
FILED
OCT 10 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

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VOLUME V

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART Co., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 DEFENDANT F. M. COCKE'S REPLY TO PLAINTIFF BUYERS' RESPONSE OF OCTOBER 12, 1972 AND TRANSAMERICA'S RESPONSE OF OCTOBER 24, 1972 TO F. M. COCKE'S MOTION TO VACATE (The Summary Judgments in Favor of Transamerica and Buyers) Filed: November 7, 1972

INASMUCH AS Plaintiff Buyers have now moved the Court to enter its order denying defendant F. M. Cocke's Motion to Vacate the separate summary judgment of November 10, 1970, in favor of Transamerica, and Transamerica has filed its Response to F. M. Cocke's Motion to Vacate the separate summary judgment of September 29, 1972, in favor of Buyers, and states

that the issues sought to be raised by F. M. Cocke's Motion are "without question res judicata," F. M. Cocke replies herein to Buyers' Response filed October 12, 1972, and to Transamerica's Response filed October 24, 1972.

In his Motion to Vacate, F. M. Cocke points out that Buyers' failure to join the escrow agent, in Buyers' Complaint For Specific Performance of the escrow agreement, left the Court without jurisdiction over the subject matter of such complaint, requiring its dismissal under Rule of Civil Procedure 12(i)3, as amended. Transamerica now claims that it is res judicata that the Court had jurisdiction over Buyers' Complaint, in Transamerica's absence.

The Motion to Vacate also points out that both of the separate summary judgments violate Rules 19(a), 19(c), 13(i), and 56d, and also violate the well settled rule of law that a court cannot rewrite a contract but must enforce it as written or not at all. The Motion to Vacate also states that the judgment of September 29, 1972, for damages, is in conflict with Rule 52(a), and that the judgment of November 10, 1970, was premature.

As stated in 6 Moore's Federal Practice, Section 54.34(2-2), Multiple Parties Actions after the 1961 Amendment to 54(b), at page 563:

> The trial court cannot by certification make final and appealable a ruling that is not final and appealable under 28 USC 1291. Sears, Roebuck & Co. v. Mackey (1956) 351 US 427, 437, 76 S.Ct. 895, 901, 100 L.ed 1297, 1307,

> 22 FR Serv 54b.4, Case 6, citing Treatise; Hamman v. United States (CA9th, 1968) 399 F.2d 673, 674. . . .

See ARS Section 12-2101, as amended.

In Caruso v. Superior Court, Pima County (1966) 100 Ariz. 167, 412 P.2d 463 (headnote 6):

> Acts in excess of a court's jurisdiction for which a writ of prohibition might issue include acts exceeding the power of a court as defined by the Constitution, statute or court rules followed under the doctrine of stare decisis, and acts where the lower tribunal has abused its discretion.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 US 603, 19 S.Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512:
>
> A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . .The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases

> which come within it, until it is repealed by the authority which made it.

Where the question of jurisdiction is one of law, a court cannot by an erroneous decision acquire jurisdiction which it has not, or divest itself of jurisdiction which it has. Risley v. Phoenix Bank, 83 NY 318, 38 Am.R. 421, aff. 111 US 125, 28 L.ed 374.

THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

In Barbier v. Connolly, 113 US 27, 28 L.ed 923, 5 S.Ct. 357, the court said:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts;
> . . .

In Northern Pac. Ry. Co. v. Kurtzman (1897) 82 F. 241, the court said:

> I recognize the absolute correctness of the proposition that the federal courts are forbidden by express provisions in the laws enacted by congress to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifying such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers, the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. Galpin v. Page, 18 Wall. 351-375; Pennoyer v. Neff, 95 U.S. 714-748; Arrowsmith v. Gleason, 129 U.S. 86-101, 9 Sup. Ct. 237; Marshall v. Holmes, 141 U.S. 589-601, 12 Sup. Ct. 62.

In Earle v. McVeigh, 91 U.S. 503, 23 L.ed 398, the court said:

> Want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under the judgment, since want of jurisdiction makes the judgment utterly void and unavailable for any purpose.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. 236, the court pointed out that where it appears from the record that the court was without jurisdiction, the action of the court is void, and that no judgment of a court is due process of law, if rendered without jurisdiction in the court.

Since it is well settled that the federal courts have the last word on federal questions, such as due process of law and equal protection of the laws, it cannot now be established that the issues raised in C-222472 by F. M. Cocke are res judicata as claimed by Transamerica.

Accordingly, defendant F. M. Cocke again urges the Court to vacate the two judgments, for want of jurisdiction.

Respectfully submitted this 7th day of November, 1972.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorney for Defendant
F. M. Cocke

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY SUPERIOR COURT NO. C-222472
FRANCIS M. COCKE, Appellant, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	APPELLANT F. M. COCKE'S REPLY TO APPELLEES' MOTION TO DISMISS Filed: March 12, 1973

By way of Reply to the Motion To Dismiss Appeal filed March 7, 1973 by Appellees Horne and James Stewart Co., F. M. Cocke respectfully submits the following:

The crux of the matter reached by appellees at page 3, lines 10 and 11, and again at page 4, lines 27-31, of their Motion to Dismiss, is whether a motion to

vacate qualifies as a motion to alter or amend, under Arizona's present Rule 59(l).

It appears that none of the cases cited by appellees are in point on this first issue. Their statement at page 4, lines 2-4, apparently attributed to the discussion in Ohio Fuel Gas of the distinction between a "vacated" and a "suspended" judgment, should not be interpreted to say that it is the motion which has utterly no effect for reason thereof.

Arizona adopted as Rule 59(l) the present Federal Rule 59(e), and Moore's Federal Practice discusses the point at issue here at page 3880 of Volume 6A:

> Although the motion under (e) is to "alter or amend" the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or vacate. It would be an unreasonably narrow position to hold that a judgment may be modified and amended only up to the thin line where it amounts to a vacation of the judgment altogether. The district court formerly had the inherent power to vacate any of its judgments during term time. The Rules were merely intended to abrogate term time as having any effect on the power of the district court over its final judgments; not to withdraw power which it formerly had to vacate a final judgment, but to require that any action of this kind must be taken in response to a proper motion made not later than 10 days from the entry of the judgment or, if the court acts on its

> own initiative, that it do so not later than 10 days after the entry of the judgment. The cases have wisely recognized the power of the court to vacate and set aside a judgment under 59(e).
>
> After the court has ruled on a 59(e) motion, it should not thereafter reconsider that ruling on a motion made later than 10 days after the entry of judgment.

At page 3, lines 12-18, of their Motion, appellees raise a second issue by seeking to establish that F. M. Cocke's Motion to Vacate contained no defense on the merits, but raised only jurisdictional issues, in each and every paragraph.

It has long been the rule in both state and federal courts in suits to vacate a judgment for want of jurisdiction, usually filed when some benefit is claimed thereunder, that the complainant must show that under the facts as alleged he is entitled to substantial relief, in order that the court's time will not be wasted. It appears that the Motion To Vacate asserts several valid defenses, and recites undisputed facts to support them. A copy of the Motion [filed Oct. 10, 1972 (A.)] is attached hereto.

As part of the agreement the enforcement of which is the subject matter of this litigation, the Motion quotes, among others, cancellation paragraphs 16, 17 and 18 (pages 2 and 3), with emphasis on the mandatory and self-executing clause "these instructions shall become cancelled" in 18. Beginning at page 5, line 11, the Motion recites the filing, as provided by paragraph

16, of F. M. Cocke's 13-day notice of intention to cancel upon Buyers' (Appellees Horne and the Company) continued failure to comply, lists their new demands and points to their subsequent affirmance thereof, asserts that they did not even attempt to comply within the 13 days, that they have never retracted their new demands, and that their insistence that the new demands be met as a condition to close of escrow constituted, without more, repudiation of the agreement.

At page 4, the Motion to Vacate quotes cancellation paragraph 24, with emphasis on the mandatory clause "all documents executed by one party only on deposit with the Escrow Agent shall be returned." Under paragraph 24 return of the deeds as documents executed by one party only, instead of delivery to Buyer, is mandatory in the event of the escrow agent's inability or unwillingness to comply with the escrow instructions, for any reason other than previous cancellation under paragraph 18. Obviously, Seller and Buyer here delegated to Transamerica, and it assumed, the right and duty as escrow agent to comply with the escrow instructions only upon the express condition that if it failed to comply, either because it was unable or unwilling, the failure put an end to the mutual rights and obligations of Seller and Buyer under the agreement, Transamerica would collect its charges, and any extra money and the deeds would be returned. The agreement itself, so cancelled, would be retained. The end of the agreement upon noncompliance by the escrow agent is independent of compliance or noncompliance by Seller or Buyer, and requires no notice or demand to or by any party. Unwillingness of Transamerica as title insurer to issue any of

the title policies puts an end to the agreement in the same manner as its failure as escrow agent to comply with the instructions.

At page 6, lines 6-9, immediately below Item 5 of the list of Buyers' new demands, the Motion To Vacate recites the undisputed fact that by letter of March 10, 1969, the escrow agent gave written notice to Sellers that Buyer had done everything required of him to close the escrow. Obviously, the escrow agent had chosen to follow Buyers' new instructions, in violation of the agreement and escrow instructions in the escrow agent's file since October 9, 1968 (page 1 of Motion). This notice was a second attempt by the escrow agent to secure a deed to Parcels 1A and 2A for the Buyers, the first having failed five days earlier, as recited beginning at page 4, line 20, of the Motion, and clearly established its inability or unwillingness to comply with the escrow instructions.

In Secrist v. State of Arizona (1965) 2 Ariz. App. 240, 407 P.2d 781, this Court held that a motion filed on 27 April, 1959, by the Attorney General of Arizona, to vacate on jurisdictional grounds adverse judgment entered 2 July, 1947, and which motion also asserted a valid defense, was a valid motion, and its denial appealable within the meaning of Rule 73(b), Rules of Civil Procedure, and Section 12-2101 A.R.S. (the Section 21-1702 A.C.A.). However, the State having failed to appeal the order denying its motion, the judgment of 2 July, 1947, was held res adjudicata as to the parties thereto.

It appears that appellees' Motion To Dismiss should be denied.

Respectfully submitted this
12th day of March, 1973.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1540 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Appellant
FRANCIS M. COCKE

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C-222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	O-R-D-E-R Filed: May 17, 1973

The motion to dismiss of appellees Horne and James Stewart Co. and the reply thereto by appellant Francis M. Cocke have been considered by Judges Donofrio, Ogg and Stevens. This does not constitute a permanent assignment of this appeal to these Judges, to this Department, or to this Division of the Court of Appeals. It appearing to the Court that the appellant's notice of appeal from the

judgments and orders as to appellees Horne and James Stewart Co. is untimely,

IT IS ORDERED dismissing appellant's appeal in its entirety as to appellees Horne and James Stewart Co.

In light of the above order, the motion of appellees Horne and James Stewart Co. for an extension of time to file the answering brief is mooted.

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO,
Presiding Judge, Department A

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 F. M. COCKE'S REPLY TO TRANSAMERICA'S MOTION TO DISMISS APPEAL AS TO TRANSAMERICA Filed: June 4, 1973

As his reply to Transamerica's Motion To Dismiss, appellant F. M. Cocke submits the following:

It should not be overlooked that the trial court refused to recognize the existence of the cancellation paragraphs 16-22 and 24 contained in the fine print portion of the escrow agreement, nor did it see fit to recognize the existence of the documents and new demands contained in Buyers' letter to the escrow agent dated March 5, 1969. The effect of the cancellation provisions, when considered

along with Buyers' letter and with the escrow agent's letter of March 10, 1969, which notified Sellers that by deposit into escrow of Buyers' documents and new demands Buyers had done everything required of them to close the escrow, is decisive of this case. This issue has been repeatedly raised by F. M. Cocke during the four years that the enforcement of the agreement has been before the courts. However, the judges earlier involved in the case have so far not made a direct ruling on this decisive issue. A copy of the agreement is in Volume XII of the Abstract, Folio II; copies of the escrow agent's and Buyers' letters are in Folio IV. The documents and demand contained in Buyers' letter are discussed in appellant's Opening Brief, beginning at page 16. The Brief is attacked in the Motion To Dismiss, particularly beginning at page 7, line 28, so permitting appropriate rebuttal by appellant.

In the Motion To Dismiss, Transamerica, even in its claim of violation of Supreme Court Rule 5(b) (discussed below), has reached for its principal support to the very judgments of the trial court, and the decision of the Court of Appeals, the validity of which is challenged by the appeal.

Beginning at the top of page 7, under the heading "Res Judicata," Transamerica states that it has been unable to uncover a single contention relating to Transamerica which has not or could not have been specifically raised in the previous appeal, and quotes the seven questions framed by the Court in that case, which were substituted for the questions presented by the opening brief. The actual

questions presented were as follows:

1. Whether the escrow officer's notice on Mar. 10, 1969, to all parties to the escrow that Buyer had done everything required of him to close the escrow constituted breach of trust and breach of the escrow agreement.

2. Whether the note and mortgage were actually delivered into escrow by F. M. Cocke, and whether the escrow could close without its return or a cash deposit to replace the extra $20,000 represented by the note and mortgage.

3. Whether Transamerica's claim, that F. M. Cocke lost title to the triangle by reason of the Starley quit-claim deed, was valid.

4. Whether Buyers repudiated the contract for sale and purchase, so terminating or cancelling the escrow, by their attempt to secure F. M. Cocke's signature to the warranty deed to land not part of any contract and to which he did not have title, and by their instruction demanding that such deed be signed as a condition to going ahead with the purchase contract.

5. Whether the escrow was cancelled by Mar. 20, 1969, in accordance with the notices of intention to cancel and paragraphs 7, 16-23, and 25 of the escrow instructions by failure of Buyers or Transamerica to comply with the escrow instructions.

6. The effect of paragraph 24 in the event of inability or unwillingness of escrow agent to comply with escrow instructions, or unwillingness of Transamerica to issue its title policy.

7. Whether Transamerica incurred liability by its failure to return either prior to or upon the filing of Buyers' Complaint on April 22, 1969, the deeds and releases held in escrow, and the amount of any such liability.

8. The question of (1) the force of paragraphs 8, 9, and 10 upon and subsequent to any breach of trust or of the escrow agreement by escrow agent, (2) their effect upon and subsequent to the filing of Buyers' Complaint, and (3) their force and effect as affected by public policy.

(emphasis added)

As can readily be determined by comparison with the seven questions quoted by Transamerica at page 7, the underlined portions of the eight actual questions presented for review were omitted.

In the first question actually presented for review, the portion deleted was whether the escrow officer's notice of Buyers' compliance constituted breach of the escrow agreement, or escrow instructions. Question 6, concerning the effect of paragraph 24 in the event of the inability or unwillingness of the escrow agent to comply with the escrow instructions, or the unwillingness of

Transamerica to issue its title policy, was deleted in its entirety. The decisive issue of whether the escrow agent's notice of Buyers' compliance put an end to the agreement under paragraph 24 by establishing the escrow agent's inability or unwillingness to comply with the instructions was thus not met.

Through its deletion of the underlined portion of Question 2 the Court failed to meet the issue of whether the escrow could close without the return of the $40,000 note and mortgage or a cash deposit of the extra $20,000 represented thereby. This $20,000 was a substantial part of the $84,000 deficiency in Buyers' mortgages, which they insisted, and still insist, be placed of record along with the deeds to Buyers before the other $64,000 of the deficiency is corrected or paid. Buyers instructed the escrow agent in their letter dated March 5, 1969, that the $64,000 was not to be paid at all unless and until the deeds included deeds to Parcels 1A and 2A. These parcels were not included in the agreement, or in any other agreement.

Question 3 concerned the small Triangle of land in F. M. Cocke's Parcel 2. In his Statement of the Case (page 13 of the 1971 Opening Brief) he pointed to the undisputed fact that Transamerica refused to insure title to Parcel 2 on its claim that Cocke was divested of title to the Triangle by a neighbor's quit-claim deed. In his argument on Question 3 such claim was effectively rebutted. Transamerica's unwillingness to insure the title, especially since not justified, obviously put an end to the agreement under paragraph 24, but by the deletion of Question 3

this issue was not met, Question 6 being also omitted.

The issue of whether Buyers repudiated the contract by their attempt to secure and their written demand for deeds to the extra land, and the issue of whether the agreement was cancelled by Buyers' failure to comply with the instructions, were raised by Questions 4 and 5. Both of these questions were omitted, and neither of the issues was met.

Question 8(1) raised the issue of whether paragraphs 8, 9 and 10 could be enforced upon and subsequent to any breach of the escrow agreement by the escrow agent. By the omission of Question 8(1), and the omission of Questions 4, 5 and 6, the issue of whether paragraphs 8, 9 and 10 could be enforced <u>after</u> the entire agreement was repudiated, or cancelled under paragraphs 16-22, or cancelled under paragraph 24, was not met.

From the above, and from an examination of the reported decision in Cocke v. Transamerica, 1972, it is manifest that the issues upon which the present appeal is based were not ruled on in that decision, and are not res judicata.

In support of Transamerica's position that the attorney fees were properly collected by the enforcement of paragraphs 8, 9 and 10 without regard to other provisions of the agreement, the Memorandum at page 2, line 9, states that the contentions contained in F. M. Cocke's Response to Transamerica's Motion to Modify Judgment (Abstract, p. 895) <u>have been fully</u> disposed of by the written opinion in Cocke v. Transamerica, 1972.

The Response among other things pointed out that Transamerica was back in the trial court seeking final enforcement of only paragraphs 8, 9 and 10 of the lengthy agreement; that the rest of the agreement, including the cancellation provisions, had not been effectively deleted by either the trial or appellate courts, since that was beyond their jurisdiction; that want of jurisdiction may always be set up against a judgment when sought to be enforced; that jurisdiction of an appellate court on review is limited to correcting the error of the trial court in entertaining the action where without jurisdiction; and that no judgment of a court is due process of law if rendered without jurisdiction.

The Response further stated that the escrow agreement still stood as agreed to by Sellers, Buyers and Transamerica, along with the other provisions and instructions, and that the escrow agent was still bound to Buyers and Sellers to either close the escrow and deliver the deeds and title policies to Buyers, or cancel the escrow and return Sellers' deeds. The Response also stated that the trial court had granted specific performance, and that specific performance must include performance by the escrow agent of its duty to close or cancel the escrow. It was further pointed out that to enforce performance by the escrow agent the court must have jurisdiction over it, and that without such jurisdiction the court would be left without the power to grant the relief sought by Buyers' Complaint, so requiring its dismissal under Rule 12(i)3, as amended.

The Response also pointed out that Transamerica's Motion was premature, and

that it should have awaited a final judgment which specified whether the escrow agent was to close or cancel the escrow, with findings of fact and conclusions of law as to whether or not the documents and demands contained in Buyers' letter dated March 5, 1969, constituted compliance by Buyers.

Clearly, in the present circumstances of this case, these contentions will not be "fully disposed of" in the manner claimed and hoped for by Transamerica unless and until it is established that the trial court had jurisdiction to erase the cancellation provisions from the agreement, and to erase Buyers' new demands, and the escrow agent's letter approving such demands, from the record. Certainly, they were not disposed of by Cocke v. Transamerica, 1972, since the issues raised by such contentions were not met, even if raised, in that earlier decision.

At page 4, line 13, the Memorandum states that in the Response as well as in the present Opening Brief, Cocke continues to assert that the Court cannot enforce one provision of the contract without enforcing all of the provisions, even though they are not involved in the litigation.

It is true that Cocke has asserted, and will continue to assert, that paragraphs 8, 9 and 10 became unenforceable in March, 1969, at least three months before Transamerica incurred any attorney fees, since such paragraphs were cancelled along with the rest of the agreement by repudiation, by cancellation under paragraphs 16-22, or by cancellation under paragraph 24. Transamerica's claim that

the cancellation provisions are not involved in this litigation, in view of the undisputed fact of Buyers' new demands and the undisputed fact of the escrow agent's approval thereof, is without foundation.

At page 4, lines 18-20, of the Memorandum, Transamerica challenges statements made in the present Opening Brief at page 34. These statements are:

> In these circumstances, it became obvious four years ago that a final determination binding on F. M. Cocke and Buyers, of whether it was solely Buyers' failure to retract their new demands that put an end to the agreement by cancellation under paragraph 18 or by repudiation, could not be made in the absence of Transamerica, inasmuch as such cancellation or repudiation did not take place before March 18, 1969, and the escrow agent's letter approving Buyers' new demands was written March 10th.
>
> It was equally obvious that a final determination binding on F. M. Cocke and Transamerica, of whether Transamerica put an end under paragraph 24 to Buyers' rights under the agreement by the escrow agent's letter of March 10, 1969, could not be made in the absence of Buyers.

It is elemental that Buyers would not be bound by a judicial determination to which they were not parties.

At page 5, lines 10 and 11, of the Memorandum, Transamerica attributes its own statements to page 2 of the present Opening Brief. The statements of which Transamerica complains begin at the bottom of page 1 of the Brief:

> The agreement is still in the executory stage. Transamerica has remained unable or unwilling to return the deeds and money to depositors in accordance with the escrow instructions agreed to by all parties, and also has remained unwilling to issue its title policies, close the escrow, and deliver the deeds and money in accordance with five new written demands received from Buyers on March 7, 1969. Title to Parcel 2, about 72 acres, and an undivided half-interest in Parcel 1, containing about 49 acres, still remains in F. M. Cocke, who is in possession of and farming both parcels. Title to the other half-interest in Parcel 1 remains in First National Bank of Arizona, Trustee. Joan H. Cocke is merely life tenant of the trust; the three Cocke daughters are the remaindermen. Unless it can be established that some court had or has the power to alter the terms of deposit into escrow of the trustee Bank's deed, which terms include Schedule A and the fine print Cancellation paragraphs 16-22 and 24, it appears that the long-litigated question of whether the life tenant is entitled to the proceeds is moot. There are to be no proceeds because such terms

> of deposit, unless successfully altered as attempted, plainly require that the Bank's deed be returned to it.

Transamerica long ago admitted that the proposed payment to Joan H. Cocke would violate the trustee Bank's escrow instructions (Kavanaugh Deposition, cross-examination by Transamerica's counsel, Feb. 27, 1970), and this Court in Higgins v. Kittleson (1965) 1 Ariz. App. 244, 401 P.2d 412, pointed out:

> The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).
>
> (emphasis added)

At page 2 of the Memorandum, Transamerica alleges failure of the Statement of Facts to comply with Rule 5(b). As its principal objection Transamerica, at lines 21-25, states:

> In fact, the two separate and distinct actions are again so intertwined and intermixed that it is exceedingly difficult, if not impossible, to ferret out the portions apparently applicable to Transamerica.

The escrow agreement itself establishes that it was Transamerica's own fine print cancellation provisions, particularly paragraph 24, which intertwined and intermixed the rights and obligations of F. M. Cocke, Buyers, the escrow agent and the title insurer. The reservation to the escrow agent and to the title insurer of the right to put an end to the agreement at will took Transamerica as escrow agent out of the traditional role of a passive and disinterested stakeholder.

Claiming a second failure to comply with Rule 5(b), beginning at page 2, line 26, of the Memorandum, Transamerica states that the Questions for Review are likewise defective. At the top of page 3 of its Memorandum, Transamerica designates "The Effect of the Cancellation Provisions" as a second Question for Review, and designates "Due Process of Law as Specified by the Rules of Procedure" as a third question. At page 3, line 6, Transamerica states:

> Hence, the mere statement of the questions drafted by appellant show their total inadequacy to advise the Court of the issues involved.

However, the first quoted phrase is a heading for argument asserting the effect of the cancellation provisions, and the

second is a heading for argument asserting violation of due process of law as specified by the Rules of Procedure.

Upon the foregoing, it is respectfully submitted that Transamerica has failed to show a material failure to comply with Rule 5(b), Rules of the Supreme Court, so as to warrant dismissal, has failed to establish that the appeal in any of its aspects is frivolous, and has failed to establish that the issues upon which the appeal is based are res judicata.

In accord with the inclination of the courts to now relax to some extent the formalities of pleading, and go to the merits, in Preston v. Denkins (1963) 94 Ariz. 214, 382 P.2d 686, the Arizona Supreme Court, sitting en banc, in a unanimous decision held that the right to challenge a judgment on the ground that it is void for lack of jurisdiction of the parties does not depend upon rules of court or statute, that a judgment void for lack of jurisdiction may be set aside by means of a motion to vacate, and that an order setting aside an entire judgment as void does not leave the judgment valid as against defendants not properly before the court on the motion to vacate.

Respectfully submitted this
4th day of June, 1973.

By /s/ L. Alton Riggs, Jr.
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COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 APPELLANT F. M. COCKE'S REPLY TO APPELLEE'S MOTION TO REFER FILE BACK TO TRIAL COURT

Filed: September 13, 1973

Appellant F. M. Cocke respectfully submits the following as his Reply to the Motion of Appellees James Stewart Company, M. Seth Horne and Maurine D. Horne for an order referring the file back to the trial court, insofar as it pertains to said Appellees, hereinafter called the "Buyers."

As Buyers themselves state at page 2 of their Memorandum, lines 6-10, they seek an order referring the file in this case,

insofar as it pertains to them, back to the trial court in order that they may seek the affirmative assistance of that court in the enforcement of the judgment entered September 27, 1972. However, it appears that Buyers have already sought and received assistance.

Attached hereto is a copy of an Order To Show Cause, signed by trial court Judge Irvin Cantor on September 7, 1973. and addressed to Transamerica Title Insurance Company of Arizona, Appellee herein. The Order was issued pursuant to Buyers' Application therefor of even date, a copy of which is also attached, with all Exhibits.

MEMORANDUM

I.

COMPLIANCE BY TRANSAMERICA WITH JUDGMENT ENTERED SEPTEMBER 27, 1972

1. STATEMENT OF FACTS

At page 1, lines 27-30, the Order To Show Cause orders Transamerica to appear on September 14, 1973, and show cause:

WHY TRANSAMERICA SHOULD NOT BE ORDERED TO COMPLY WITH THE JUDGMENT ENTERED BY THE TRIAL COURT ON SEPTEMBER 27, 1972.

The judgment entered on September 27, 1972, is a summary judgment, except as to the amount of damages awarded to Buyers for claimed delay, and is the judgment entered in favor of Buyers on their Complaint For Specific Performance of the escrow agreement. The filing of such Complaint in April, 1969, marked the

beginning of this extended litigation.

Although Buyers' Complaint (p. 1 of Abstract) sought at least partial performance by Transamerica both as title insurer and as escrow agent, by demanding as part of the relief sought that the title insurance policies be issued and the escrow be ordered closed, Transamerica has never been joined in Buyers' action. Buyers' Complaint named only the Sellers as defendants, and their action was prosecuted against only Seller F. M. Cocke. The judgment entered September 27, 1972, was entered against only F. M. Cocke.

Transamerica was brought into the case as an additional defendant on F. M. Cocke's compulsory Counterclaim, which he filed along with his Answer to Buyers' Complaint. The Counterclaim, brought jointly and severally against Buyers and Transamerica, sought the return by the escrow agent of Sellers' deeds by the enforcement of cancellation paragraphs 16-22 and 24 of the fine print portion of Transamerica's printed escrow form. A copy of the agreement is in Volume XII of the Abstract, Folio II, and consists of fourteen legal-size, fold-out pages. Transamerica's fine print escrow instructions have been retyped to legible size.

2. TRANSAMERICA IS A REAL PARTY IN INTEREST

Sellers' and Buyers' delegation, by paragraph 24 of Transamerica's fine print escrow instructions, to Transamerica as escrow agent and as title insurer of the power to put an end to the agreement at will, independent of compliance or non-compliance by Sellers or Buyers, took

Transamerica as escrow agent out of the traditional role of a passive and disinterested stakeholder, and made it not only a real party in interest but actually the dominant party to the escrow contract. It was long ago established that any person materially involved in the subject matter of an action is a real party in interest, and unless joined in the action cannot be bound by the judgment. Mosher v. Hiner (1945) 62 Ariz. 110, 154 P.2d 372, certiorari denied 325 U.S. 874, 89 L.ed. 1992, 65 S.Ct. 1554. Even though Buyers have sought to impose on F. M. Cocke duties which Buyers and Sellers together delegated to Transamerica, such as issuing of the title policies and closing the escrow, the subject matter of Buyers' action for specific performance of the escrow agreement was and is plainly the enforcement of its applicable provisions. In view of the fact that the escrow agent remains in possession of Sellers' documents and Buyers' money, and is liable for damage suffered by either by reason of any failure on its part to comply with the escrow instructions, it cannot be effectively denied that Transamerica was and is a real party in interest to such enforcement, particularly of fine print paragraphs 16-22 and 24, and cannot be bound by the September 27, 1972, judgment against F. M. Cocke, since it was not joined in Buyers' action.

II.

LACK OF TRIAL COURT'S JURISDICTION OVER MATTERS CONNECTED WITH THE CASE

1. JURISDICTIONAL QUESTIONS STILL BEFORE THE COURT OF APPEALS

Unlike the Buyers, Transamerica in its motion to dismiss the appeal did not question the timeliness of the Notice of Appeal nor the perfecting of the appeal. Like the Buyers' motion to dismiss, however, its motion failed to meet the requirements of Supreme Court Rule 7(c), as required by Rule 7(b) or 7(d), and Rule 7(e). Transamerica as its grounds for dismissal alleged failure to comply with Rule 5(b), and that the appeal was frivolous.

Transamerica's main objection under Rule 5(b), which begins at page 2, line 17, of its Memorandum, is that F. M. Cocke's Opening Brief, after laying a factual background, asserts at page 37 that the separation of F. M. Cocke's counterclaims, which sought to enforce the cancellation provisions against Buyers and Transamerica as joint defendants, into two separate and independant actions with separate judgments, violated due process of law.

Transamerica's main objection under its claim of frivolity was that the issues argued in the Opening Brief were res judicata, having been determined in the earlier appeal. In attempting to prove its point Transamerica listed seven questions framed by the Court in the earlier appeal and which were substituted for the questions actually presented by the earlier opening brief. Included in the actual questions presented but not met or ruled on as a result of the substitution were part of Question 2, and Questions 3, 4, 5, and 6 in their entirety, all of which, with the possible exception of Question 4, involve the effect or enforcement of the cancellation provisions 16-22 or 24.

At page 4, lines 13-20, of Transamerica's Memorandum in support of its Motion To Dismiss, Transamerica takes particular exception to statements made in F. M. Cocke's present Opening Brief in his argument on the effect of the cancellation provisions, which Transamerica states are not involved in the litigation. Transamerica also objects to the statements beginning on page 34 of the Opening Brief, because they assert that a final determination of the effect of the cancellation provisions cannot be made in the absence of either Transamerica or the Buyers. These statements are:

> In these circumstances, it became obvious four years ago that a final determination binding on F. M. Cocke and Buyers, of whether it was solely Buyers' failure to retract their new demands that put an end to the agreement by cancellation under paragraph 18 or by repudiation, could not be made in the absence of Transamerica, inasmuch as such cancellation or repudiation did not take place before March 18, 1969, and the escrow agent's letter approving Buyers' new demands was written March 10th.
>
> It was equally obvious that a final determination binding on F. M. Cocke and Transamerica, of whether Transamerica put an end under paragraph 24 to Buyers' rights under the agreement by the escrow agent's letter of March 10, 1969, could not be made in the absence of Buyers.

It is clear, therefore, that the issue of whether or not the trial court had

jurisdiction to separate the enforcement of the cancellation provisions into two separate and independent actions, and to proceed to separate and independent judgments, neither of which ruled on their effect, is before the Court of Appeals on Transamerica's Motion to Dismiss as well as on the Appeal itself.

In a determination by the Court of Appeals either on the Motion to Dismiss or on the Appeal itself of the jurisdictional issue pointed out in the preceding paragraph: if it be held that the trial court did not have jurisdiction to separate the enforcement of the cancellation provisions against Buyers and Transamerica into two separate and independent actions, and to proceed on to separate and independent judgments, then the judgment entered September 27, 1972, in favor of Buyers will be void for want of jurisdiction over Transamerica.

If it be held that the trial court did have jurisdiction to separate the enforcement of the cancellation provisions against Buyers and Transamerica into two separate and independent actions, and to proceed against each in the absence of the other on to separate and independent judgments, then the issue of whether Transamerica put an end to the agreement under paragraph 24, so putting an end to Buyers' claimed rights under the agreement, being before the Court of Appeals, can be determined in Buyers' absence.

Inasmuch as the issue of the validity of the judgment entered September 27, 1972, remains before the Court of Appeals, the trial court remains without jurisdiction to proceed with the enforcement thereof

pending final determination. Atkinson v. Atkinson (1965) 2 Ariz. App. 1, 405 P.2d 919.

III.

A SUBSTITUTE ESCROW AGENT TO ENFORCE THE ESCROW CONTRACT AS MODIFIED BY THE JUDGMENT ENTERED SEPTEMBER 27, 1972

1. NEW EVIDENCE ON THE MODIFICATION OF THE ESCROW CONTRACT

At page 2, lines 5-16, the Order to Show Cause orders Transamerica to appear on September 14, 1973, and show cause:

WHY, IN THE EVENT OF TRANSAMERICA'S INABILITY OR UNWILLINGNESS TO PROCEED WITH THE CLOSING OF THE ESCROW AS MAY BE DIRECTED BY THE TRIAL COURT, SUCH COURT SHOULD NOT APPOINT AS AN OFFICER OF SUCH COURT A SUBSTITUTE ESCROW AGENT TO ACT IN ACCORDANCE WITH THE ESCROW CONTRACT AS MODIFIED BY THE JUDGMENT ENTERED SEPTEMBER 27, 1972, AND BE SUBSTITUTED WITH ALL OF TRANSAMERICA'S RIGHTS, PRIVILEGES, AND DUTIES.

At page 2, lines 11-15, the Order to Show Cause, by reference to "the contract entered into on October 9, 1969 . . . as modified by the judgment entered September 27, 1972", recognizes and so admits that the escrow agreement was, as a matter of fact, modified by the judgment. Buyers' Application recognizes or asserts such modification of the "contract and escrow instructions" twice at page 8, line 28, to page 9, line 1, again at page 9, lines 27-28, at page 10, lines 5-7 and 25-27, and at page 11, lines 24-26. Among other Exhibits, Buyers have attached to their Application a copy of the judgment entered

September 27, 1972, which in the last clause, beginning at page 8, line 28, refers to the "terms of said contract as modified hereby."

In Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967) the court pointed out:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Coop., Inc. v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

Manifestly, Buyers in their Application and the trial court judge in his Order To Show Cause now recognize or assert, and so admit, that the modification of the contract entered into by the parties is an integral and decisive part of the judgment of September 27, 1972, in favor of Buyers. In the light of these later admissions, the true meaning and intended effect of the tiny clause at the very end of the judgment itself, "as modified hereby," now stands revealed. Such modification was and is beyond the power or jurisdiction of the court, and the judgment entered September 27, 1972,

was and is therefore void on its face, and the Order To Show Cause is without basis. Goodman v. Newzona, supra.

2. THE PROPOSED SUBSTITUTE ESCROW AGENT

There is no provision in the escrow agreement which authorizes the appointment of a substitute escrow agent by Buyers or by Transamerica or by their joint action. Nor is there any provision in the law which authorizes the trial court judge to modify the agreement by adding such a provision. Goodman v. Newzona, supra.

Further, where a defendant escrow agent is under the jurisdiction of the Court of Appeals, awaiting the determination of issues as to whether the escrow is to be closed or cancelled, the trial court is without jurisdiction to appoint a substitute escrow agent with authority to close the escrow. Following perfecting of an appeal, the trial court loses jurisdiction of matters connected with the case, except in furtherance of the Appeal. Atkinson v. Atkinson, supra.

It should not be overlooked that fine print paragraph 43 provides, simply and effectively:

> "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

Manifestly, the escrow cannot be closed by any escrow agent, until the title policies are issued. Transamerica has remained unwilling to issue its title policy on Parcel 2 since March 20, 1969 (p. 20 of Opening Brief), and has remained unwilling to

issue its title policy on Parcel 1 since February 27, 1970 (Deposition of Henry Kavanaugh, escrow officer, questioned by Transamerica's attorney, February 27, 1970, p. 42).

As this Court pointed out in Higgins v. Kittleson (1965) 1 Ariz. App. 244, 401 P.2d 412:

> The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).
>
> (emphasis added)

Clearly, if the deeds are delivered in violation of the terms of deposit, the depositors of the deeds can retake the land.

3. THE CONDITIONAL JUDGMENT ENTERED ON SEPTEMBER 27, 1972

It should be noted that the judgment entered on September 27, 1972, in favor of

Buyers contains the following order, quoted in Buyers' Memorandum at page 4, lines 19½-21½, and in the attached copy of the judgment at page 8, lines 19-23, thereof:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contracts, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;
>
> (emphasis added)

The trial court here ordered, adjudged and decreed that F. M. Cocke is to perform only upon compliance by Buyers with the terms of "said contract". As said in the previous paragraph of the judgment, this is the contract dated October 9, 1968, not September 27, 1972.

IV.

CONCLUSION

Buyers' attempt to now subject Transamerica, or other escrow agent, to jurisdiction of the trial court has come four years and a multitude of proceedings too late, and serves merely to admit that Transamerica is a real party in interest, and so to admit the fatal lack of jurisdiction of the trial court over Buyers' action for specific performance, because of Buyers' failure to join Transamerica.

As pointed out by Mosher v. Hiner, supra, Transamerica cannot be bound by the judgment since it was not joined in the action and was not a party to the

proceedings therein.

It is manifest that Buyers' Motion for an order referring the file should be denied.

Respectfully submitted this 13th day of September, 1973.

/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 F. M. COCKE'S MOTION FOR FINDINGS OF GROUNDS UPON WHICH HIS NOTICE OF APPEAL AS TO BUYERS WAS HELD TO BE UNTIMELY IN ITS ENTIRETY Filed: September 19, 1973

Appellant F. M. Cocke respectfully moves the Court for a specific finding of the grounds upon which his Notice of Appeal from the judgments and orders as to appellees James Stewart Co. and the Hornes, herein called the Buyers, was held by the Order of May 17, 1973, to be untimely in its entirety, and for such other relief as the Court deems meet and just, for the reasons set forth below.

STATEMENT OF FACTS

1. Buyers in their Motion to Dismiss advanced several different theories in

support of their contention that the Notice of Appeal was untimely, but there was no finding in the Order of May 17, 1973, as to which of these if any was, or were, adopted by the Court.

Buyers in their Motion contended beginning at page 2, line 18, that F. M. Cocke's Motion to Vacate did not qualify as a motion to alter or amend under Rule 59(1), so as to extend the time limit for a notice of appeal from the judgments, under Rule 73(b)2iii, as amended.

At page 2, lines 18-28, Buyers suggested the Motion to Vacate was itself untimely, and correctly showed that it was filed October 10, 1972, thirteen days after September 27, 1972. Buyers did not mention that ten days after September 27, 1972, fell on a Saturday, nor that the following Monday was a court holiday. At page 3, lines 12-18, Buyers suggested that the Motion to Vacate did not assert a defense on the merits by claiming that in each and every paragraph thereof it sought to have the court vacate the judgment and declare the same void for lack of jurisdiction.

The Motion to Vacate, filed October 10, 1972, is in Vol. XI of the Abstract, at pages 954-987. Buyers' Response thereto, filed October 12, 1972, is at pages 988 and 989, and Transamerica's Response, filed October 24, 1972, is at pages 990-992. F. M. Cocke's Reply to these responses, filed November 7, 1972, is at pages 993-1000.

The trial court's minute order of November 6, 1972, denying F. M. Cocke's Motion to Vacate, and the minute order

of November 8, 1972, acknowledging receipt of F. M. Cocke's Reply, stating the court had reviewed the "Response" and its ruling of November 6, 1972, and reaffirming its ruling of November 6, 1972, are the last two minute entires in Vol. XIII of the Abstract.

In the Court of Appeals, Buyers' Motion to Dismiss revealed no attempt to comply with the mandatory provisions of Supreme Court Rule 7. There was no certificate, as required by Rule 7(c)1, of the clerk of the superior court certifying, nor did Buyers otherwise mention, that the Orders of November 6 and 8, 1972, were appealed from. Both such orders were designated by the Notice of Appeal (Vol. XI, p. 1008 of Abstract).

In F. M. Cocke's Reply to Buyers' motion to dismiss the appeal, at page 4, line 15, he called the court's attention to its holding in Secrist v. State of Arizona (1965) 2 Ariz. App. 240, 407 P.2d 781, that a motion filed on 27 April, 1959, by the Attorney General of Arizona, to vacate on jurisdictional grounds an adverse judgment entered 2 July, 1947, and which motion also asserted a valid defense, was a valid motion, appealable within the meaning of Rule 73(b) and Section 12-2101 ARS.

In his Motion For Rehearing, F. M. Cocke at page 3, line 23½, again pointed to the Secrist case, and at page 4, line 3, to Preston v. Denkins (1963) 94 Ariz. 214, 382 P.2d 686, in which the Arizona Supreme Court, sitting en banc, in a unanimous decision held that the right to challenge a judgment on the ground that it is void for lack of jurisdiction

of the parties does not depend upon rules of court or statute, that a judgment void for lack of jurisdiction may be set aside by means of a motion to vacate, and that an order setting aside an entire judgment as void does not leave the judgment valid as against defendants not properly before the Court on the motion to vacate.

MEMORANDUM OF POINTS AND AUTHORITIES, AND ARGUMENT

The right under the due process clause of the 14th Amendment to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence and have judicial findings based upon it. 16 AmJur 2d 984, Constitutional Law, Section 579, citing Baltimore and Ohio R. Co. v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797; Butler v. State, 217 Miss. 40, 63 So. 2d 779.

In State of Washington ex rel. Oregon Railroad and Navigation Co. v. Fairchild, 224 U.S. 510, 56 L.ed 863, 32 S.Ct. 535, the court said:

> This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of fact, but, as said in Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U.S. 591, ante. 565, 32 Sup. Ct. Rep. 320, from an inspection of the "entire record including the evidence, if properly incorporated therein, to determine whether what purports to be a

> finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."
>
> (emphasis added)

Where the question of jurisdiction is one of law, a court cannot by an erroneous decision acquire jurisdiction which it has not, or divest itself of jurisdiction which it has. 21 CJS, Courts, Section 115.

The Court of Appeals, Division 2, in In Re Estate of Henry (1967), 6 Ariz. App. 183, 430 P.2d 937, quoted and followed Bernstein, "The Disposition of Civil Appeals in the Supreme Court," 5 Ariz. L. Rev. 175-192 (Spring 1964):

> If counsel believes that grounds exist for dismissing an appeal, he should assume the affirmative burden of demonstrating that to the Court by motion. A motion to dismiss must be presented in writing. Rules 4 and 7 of the Rules of the Supreme Court (17 A.R.S.) prescribe in detail the form of the motion, the number of copies, the notation of service, the time for the response, as well as the other formal requirements. These requirements should be followed explicitly. They insure that the parties have a full opportunity to present to the Court, and that the Court has before it, all applicable facts and arguments. A motion which has such final and serious consequences as one to

> dismiss an appeal should not be presented or decided perfunctorily. (Emphasis added by Court)

In the instant case, the applicable fact of the appeal from the Orders of November 6 and 8, 1972, and therefore its dismissal, were not before the Court on Buyers' Motion to Dismiss, inasmuch as no mention of the appeal or of its dismissal was made by either the Motion or by a certificate of the clerk of the superior court.

In Caruso v. Superior Court In And For County of Pima (1966) 100 Ariz. 167, 412 P.2d 463, the court said:

> Acts in excess of jurisdiction include acts exceeding the power of the court as defined by constitution, statute or court rules followed under the doctrine of stare decisis, Abelleira v. District Court, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715 approved in Duncan v. Truman, 74 Ariz. 328, 248 P.2d 879, and acts where the lower tribunal has abused its discretion. Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764, 73 A.L.R.2d 1; State ex rel Rohan v. Superior Court, 95 Ariz. 319, 390 P.2d 109.

In the Abelleira case (1941) the California Supreme Court said:

> Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.

But in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, through the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has not "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structures of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional.

In our own recent decision, Rohan v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112, we said: '. . . some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to

> the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess.'
>
> (emphasis added)

In the instant case the prescribed procedure was prescribed by Supreme Court Rule 7.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603, 19 S.Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512: "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case . . . .The courts may rescind or repeal their rules, without doubt; or in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."
>
> (emphasis added)

Obviously, it does not lie within the power of the parties to free the court from the binding effect of existing and mandatory rules.

A court is bound to take notice of the limits of its authority; and it is its right and duty to make a preliminary examination of its jurisdiction to entertain the cause, of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel. If the court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect by staying the proceedings, dismissing, or other appropriate action. These rules apply irrespective of the wishes of the parties, or either of them. 21 CJS, Courts, Section 114.

Courts exercising appellate jurisdiction will examine into their power to entertain the matter before them even in the absence of an issue being raised by counsel. Stevens v. Mehagian's Home Furnishings, Inc., 90 Ariz. 42, 365 P.2d 208 (1961); Ginn V. Superior Court, 1 Ariz. App. 455, 404 P.2d 721 (1965); Searles v. Haldeman, 3 Ariz. App. 294, 413 P.2d 860 (1966).

In Thompson v. Whitman, 85 U.S. 457, 21 L.ed 897, the court said:

> Thus, in Elliott v. Peirsol, 1 Pet., 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: Where a court

> has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.
>
> (emphasis added)

The authority to entertain motions to dismiss having been granted by Rules 4 and 7, the Court remains without authority to entertain such motions except upon the terms and conditions therein specified.

Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void, not voidable, even prior to reversal, whether the lack of jurisdiction appears on the face of the record or by proof outside of it; likewise, a court's acts in excess of its jurisdiction are void, even if it has jurisdiction of the subject matter of the action and of the parties, as where a court of special or limited jurisdiction exceeds its powers. 21 CJS, Courts, Section 116. The jurisdiction of the Court to entertain motions to dismiss is plainly limited to motions that meet the mandatory provisions of Rule 7.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. 236, the court said, quoting Scott v. McNeal, 154 U.S. 34, 46, 38 L.ed 896, 901, 14 S.Ct. 1108:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, . . .

Truax v. Corrigan, 257 U.S. 312, 66 L.ed 254, 42 S.Ct. 124, quoted and followed Barbier v. Connelly, 113 U.S. 27, 28 L.ed 923, 5 S.Ct. 357, in which the court said:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all person. . .should have <u>like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts</u>; . . .
>
> (emphasis added)

In Lindus v. Northern Insurance Co. of New York, Reh. Den. 1968, 103 Ariz. 160, 438 P.2d 311, the court said:

> We believe, however, that the proper criterion to be considered in determining whether to recall a mandate was succinctly expressed by the Supreme Court of the United States in the United States v. Ohio Power Co., 353 U.S. 98, 99, 77 S.Ct. 652, 653, 1 L.ed.2d 683, where it is stated: ". . .the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

> Of course where there has been either fraud, imposition, or mistake of fact, the court can always recall a mandate to modify or correct its own judgment. Overson v. Martin, 90 Ariz. 151, 367 P.2d 203.

CONCLUSION

It is clear that Buyers' Motion to Dismiss placed before the Court the question whether F. M. Cocke's Notice of Appeal from the Judgments was timely. This question made necessary the determination (1) whether the Motion to Vacate was timely, and (2) whether it qualified as a motion to alter or amend under Rule 59(1), so as to extend the time limit for a notice of appeal from the judgments.

It is equally clear that Buyers' Motion to Dismiss did not place before the Court the question (3) whether F. M. Cocke's Notice of Appeal from the Orders of November 6 and 8, 1972, denying his Motion to Vacate was timely, but that Buyers' Motion to Dismiss did place before the Court, although somewhat obliquely, the question (4) whether F. M. Cocke's Motion to Vacate asserted a valid defense on the merits.

The Court of Appeals Order of May 17, 1973, found only that F. M. Cocke's Notice of Appeal was untimely in its entirety as to appellees James Stewart Co. and the Hornes.

The questions whether (5) Secrist v. State of Arizona, supra, and (6) Preston v. Denkins, supra, are controlling as to F. M. Cocke's Motion to Vacate were

raised in his Reply and Motion For Rehearing.

Upon the above facts and law it appears that appellant is entitled as a matter of due process to findings on the questions listed above, and to such other relief as the Court deems meet and just.

Respectfully submitted this
19th day of September, 1973.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1540 E. University, Suite 200
Mesa, Arizona 85203
Attorney for appellant
Francis M. Cocke

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	1 CA-CIV 2306 DEPARTMENT A MARICOPA COUNTY Superior Court No. C-222472 MEMORANDUM IN OPPOSITION TO F. M. COCKE'S MOTION FOR FINDINGS OF GROUNDS UPON WHICH HIS NOTICE OF APPEAL AS TO BUYERS WAS HELD TO BE UNTIMELY IN ITS ENTIRETY Filed: September 21, 1973

Appellant, F. M. Cocke, has filed a motion requesting this Court to make a specific finding "of the grounds upon which his Notice of Appeal from the judgments and orders as to appellees James Stewart Co. and the Hornes, ... Buyers, was held by the Order of May 17, 1973, to be untimely in its entirety, and for such other relief as the Court deems meet and just, ..." This is a memorandum in opposition to that motion. For the reasons set forth below, the appellees maintain that the motion must be summarily denied.

On May 17, 1973, this Court entered an order in response to a motion filed by appellees James Stewart Co. and the Hornes to dismiss the appeal of F. M. Cocke against them on the grounds that it was not timely perfected. That order provided, in part, as follows:

> "It appearing to the Court that the appellant's notice of appeal from the judgments and orders as to appellees Horne and James Stewart Co. is untimely,
>
> "IT IS ORDERED dismissing appellant's appeal in its entirety as to appellees Horne and James Stewart Co."

Section 12-120.24, A.R.S., provides, in part, as follows:

> "A party ... against whom a motion for dismissal of the action has been granted in the court of appeals may file in such court a motion for rehearing after the rendition of the ... order of dismissal, setting forth with particularity the reasons why he believes the ... order of dismissal erroneous.... If the motion is denied, and the party against whom the ... order has been rendered desires a further review by the supreme court, he shall serve upon the opposite party and file with the clerk of the division a statement that he desires such review.... If no request for review by the supreme court has been filed, ... the clerk of the division shall, ... issue the mandate of the court of appeals, ...

by certified copy of the order of the court."

Following the dismissal of the appeal of F. M. Cocke against Stewart and Horne, the appellant filed a timely motion for rehearing as to the Court's order dated May 17, 1973. On June 13, 1973, the Court denied the appellant's motion for rehearing. The appellant did not file a petition for review with the Supreme Court following the denial of the motion for rehearing as provided by Rule 47(b) of the Rules of the Court of Appeals, and therefore, on July 5, 1973, the Court entered its order dismissing the cross-appeal of Stewart and Horne pursuant to its order of June 13, 1973.

Based upon the foregoing, the instant motion should be summarily denied. Stewart and Horne submit that the appeal of F. M. Cocke is not concluded. This follows from the denial of his motion for a rehearing on June 13, 1973, and his failure to file a petition for review with the Supreme Court. If appellant wanted to pursue this matter further, he need only to have filed a timely petition for review. Having not done so, Stewart and Horne submit that this Court is without further jurisdiction other than the issuance of its mandate referring the case back to the Superior Court.

Moreover, the motion of Cocke should be dismissed as unmeritorious. An order of this Court is not a decision as requires publication setting forth the specific findings and reasons upon which the appeal was dismissed. Cf. McRae v. Forren, 428 P.2d 129 (1967).

It follows that F. M. Cocke's motion

for findings of grounds upon which his notice of appeal as to buyers was held to be untimely in its entirety should be summarily denied.

Respectfully submitted,

KELLY AND CORBIN

/s/ Hubert E. Kelly
Hubert E. Kelly
Attorneys for Appellees
James Stewart Co., an Arizona corporation, M. Seth Horne and Maurine D. Horne, his wife

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C-222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	O-R-D-E-R Filed: October 2, 1973

The motion to dismiss appeal filed by appellee Transamerica Title Insurance Company, its request for assessment of attorney's fees and costs on appeal and the response thereto have been considered by Judges Donofrio, Ogg and Stevens. In addition, the "motion to refer file pertaining to James Stewart, an Arizona corporation, M. Seth Horne and Maurine D.

Horne, his wife, back to Maricopa County Superior Court" and the reply thereto have also been considered. It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous.

IT IS ORDERED granting Transamerica Title Insurance Company of Arizona's motion, and the appeal is hereby dismissed.

IT IS FURTHER ORDERED that it is the opinion of the Court that the appeal is frivolous. Nevertheless, the Court declines to impose sanctions authorized by A.R.S. §12-2106.

IT IS FURTHER ORDERED denying the motion of Stewart and Horne to refer portions of the file back to the Maricopa County Superior Court.

/s/ Francis J. Donofrio
FRANCIS M. DONOFRIO,
Presiding Judge, Department A

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC.
Filed: November 9, 1973

Defendant F. M. Cocke respectfully moves the Court to set aside the Order, dated October 31, 1973, Granting Application For Writ Of Assistance, or, Alternatively, Requiring Compliance With Judgment Dated September 27, 1972, Or For A Supplemental Bill Enforcing Said Judgment, upon the following grounds:

I.

ORDER TO SHOW CAUSE, AND HEARING, PREMATURE

It appears that plaintiff's Application For Writ Of Assistance, etc., was filed, and the Order To Show Cause signed, in the trial court on September 7, 1973. On September 10, 1973, Appellees James Stewart Company, M. Seth Horne and Maurine D. Horne filed in the Court of Appeals their Motion to Refer File pertaining to them back to Superior Court. This motion evidenced appellees' admission that jurisdiction remained in the appellate court, along with the record. F. M. Cocke's Reply to Buyers' Motion to Refer (copy attached as Exhibit A) was filed September

13, 1973. On October 2, 1973, the appellate court exercised jurisdiction by denying appellees' Motion to Refer File, and granted Transamerica's motion to dismiss as to Transamerica.

It also appears that the only hearing held on plaintiff's Application For Writ, etc., was held October 12, 1973, pursuant to the Order to Show Cause issued September 7, 1973.

Under Supreme Court Rule 9(a), F. M. Cocke was allowed 15 days from October 2, 1973, to file a motion for rehearing on the order dismissing his appeal as to Transamerica. Throughout such time period the appellate court then retained jurisdiction over the issues raised by Transamerica in its Motion to Dismiss. Copies of such motion and of F. M. Cocke's Reply thereto are attached as Exhibit B. These issues included the issue of whether the trial court had jurisdiction to separate the enforcement of the cancellation provisions, sought by F. M. Cocke's counterclaim jointly and severally against Buyers and Transamerica, into two separate and independent actions, with separate and independent judgments. Neither of the judgments ruled on the effect of the cancellation provisions.

The issues of the validity of the September 27, 1972, judgment in favor of Buyers therefore remained within the jurisdiction of the appellate court until October 17, 1973.

The Order to Show Cause issued on September 7, 1973, and the hearing held pursuant thereto on October 12, 1973, were therefore premature, and not within

the power of the jurisdiction of the Court.

The file was not returned to the Superior Court until October 30, 1973.

Where the question of jurisdiction is one of law, a court cannot by erroneous decision acquire jurisdiction which it has not, or divest itself or jurisdiction which it has. 21 CJS, Courts, Section 115.

For the foregoing reasons defendant-counterclaimant F. M. Cocke respectfully requests that the Order entered October 31, 1973 be set aside.

Respectfully submitted this 9th day of November, 1973.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1450 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Appellant
Francis M. Cocke

STATE OF ARIZONA)
: ss.
County of Maricopa)

F. M. COCKE being first duly sworn, on oath deposes and says:

That he is one of the defendants in the foregoing entitled and numbered cause; and that he has read the foregoing motion and knows the contents thereof, and that the matters and things stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as

to those matters he believes them to be true.

/s/ Francis M. Cocke
FRANCIS M. COCKE

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

AMENDMENT TO F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC.
Filed: November 13, 1973

Comes now defendant F. M. Cocke and hereby amends his Motion To Set Aside Order Of October 31, 1973, Granting Application For Writ Of Assistance, Etc., as follows:

At page 2, line 30, changing the word "of" to "or"; at page 3, line 5, changing the phrase "or jurisdiction" to "of jurisdiction"; at page 3, line 15, changing "Appellant" to "Defendant", and following page 3, line 9½, add the following:

Further, the proposed Writ of Assistance, Etc., could only issue against parties bound by the decree. Terrell v. Allison, 21 Wall (U.S.) 289, 22 L.ed 634; 6 Am Jur 2d, Assistance, Writ Of, Section 9. Transamerica was not a party to Buyers' action for specific performance.

Buyers' Application For Writ, Etc., and the Order To Show Cause, of September 7, 1973, and the Order of October 31, 1973, Granting Writ Of Assistance, Etc., established that on September 7 and October 31, 1973, the escrow agent, as holder of Sellers' deeds and Buyers' money and mortgages, was an indispensable party to

Buyers' action. Transamerica was therefore an indispensable party upon the filing of Buyers' Complaint For Specific Performance, on April 22, 1969.

Although Buyers attached a copy of the preliminary Agreement and escrow instructions to their Complaint, and demanded as part of the relief sought that the title policies be issued and the escrow be ordered closed, Buyers failed to join Transamerica under Rule 19 as amended, 16 ARS Rules of Civil Procedure. This left the Court without the power to grant the relief sought, and thus without jurisdiction to determine the rights of the parties, Terrell v. Allison, supra., or as stated by Rule 12(b), without jurisdiction over the subject matter. Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945. The judgment being void on the face of the judgment roll is void on its face. Arenas v. United States, 95 F. Supp. 962, affirmed (9th Cir. 1952) 197 F.2d 418.

The Order of October 31, 1973, took judicial notice that Transamerica was no longer willing to act as escrow agent and close the escrow as modified by the judgment of September 27, 1972, or in any manner act in connection with the said escrow or the closing thereof.

The fifth paragraph of Schedule "A" provides:

> These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale

of the property described under the terms set forth herein.

If any applicable and material term of the preliminary Agreement and escrow instructions was modified by the judgment, the judgment is to that extent void for want of jurisdiction. Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318.

The established unwillingness of Transamerica as escrow agent to comply with the escrow instructions and as title insurer to issue the title policies now requires the prompt return of Sellers' three deeds to the depositors thereof, as specified by the mandatory and self-executing terms of paragraph 24.

Respectfully submitted this 13th day of November, 1973.

/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1450 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Defendant
Francis M. Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman

C-222472

PLAINTIFFS' RESPONSE TO F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC., AND AMENDMENT THERETO
Filed: November 20, 1973

This is a memorandum in response to F. M. Cocke's Motion to Set Aside Order of October 31, 1973, granting the writ of assistance issued by the Court on that day, and his amendment to said motion filed on or about November 13, 1973.

The gravamen of the motion of F. M. Cocke is that the order to show cause, hearing and the resulting order and writ issued by the Court were untimely because the Court was without jurisdiction to do so. Plaintiffs submit that the motion of F. M. Cocke should be summarily denied for the following reasons.

First, F. M. Cocke was given adequate notice of the filing of plaintiffs' Application for Writ of Assistance, or, Alternatively, for an Order Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing Said Judgment, the Order to Show Cause issued by the Court on September 7, 1973, and the resulting hearings thereon. The file contains the affidavit of counsel to the effect that the Application for Writ of Assistance and the Order to Show Cause

were served on counsel for F. M. Cocke on September 7, 1973. Therefore, F. M. Cocke's failure to respond and his failure to appear at the hearing on the application constitute a default and he is in no standing at this particular time to move to set aside the order of October 31, 1973, and the writ of assistance issued pursuant thereto.

Secondly, the position of F. M. Cocke that the trial court exceeded its jurisdiction is wholly without grounds. The general rule is that the dismissal of an appeal leaves the decree of the subordinate court in effect. A dismissal is a final disposition of a case in the appellate court and deprives that court from further jurisdiction. 5 Am. Jur. 2d, Appeal and Error, Section 930. In addition, the perfecting of an appeal within the time prescribed is jurisdictional. Where the appeal is not timely filed, the appellate court acquires no jurisdiction other than that necessary to dismiss the appeal. Edwards v. Young, 486 P.2d 181, 182 (Ariz. 1971); Harbel Oil Co. v. Steele, 298 P.2d 789, 790 (Ariz. 1956).

Under the holding of the foregoing cases, plaintiffs submit that the appellate court, insofar as the appeal of F. M. Cocke related to them, never acquired juridiction, and therefore this court was at all times a jurisdictional forum for them to seek enforcement of the judgment of September 27, 1972. With regard to F. M. Cocke's appeal concerning counterdefendant, Transamerica Title Insurance Company of Arizona, there was no privity between that appeal and plaintiffs' case, and therefore in no way should it interfere with the order granted by the Court on October 31,

1973, giving plaintiffs the relief sought by the Application for Writ of Assistance.

For the foregoing reasons, it is respectfully submitted that the motion filed by F. M. Cocke to set aside the order of October 31, 1973, granting the Application for Writ of Assistance, and his amendment thereto, should be summarily denied.

Respectfully submitted,

KELLY AND CORBIN

/s/ Hubert E. Kelly
Hubert E. Kelly
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO.,an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE,his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 TRANSAMERICA TITLE'S RESPONSE TO F. M. COCKE'S MOTION TO SET ASIDE ORDER OF OCTOBER 31, 1973, GRANTING APPLICATION FOR WRIT OF ASSISTANCE, ETC., AND AMENDMENT THERETO Filed: November 29, 1973

F. M. Cocke's Motion essentially attacks the jurisdiction of this Court. Suffice it to say that this Court has jurisdiction by virtue of the fact that the real property involved in the litigation is in Maricopa County and by virtue of the fact that Mr. Cocke, the purchasers,

Transamerica Title and all parties involved have openly and willingly submitted themselves to the jurisdiction of this Court. It is Transamerica Title's position that this Court has had jurisdiction at all material times and does now have jurisdiction to enter the orders that have been entered herein.

Respectfully submitted,

BROWDER & GILLENWATER, P.C.

By /s/Powell B. Gillenwater
Powell B. Gillenwater
Attorneys for Transamerica Title Insurance Company of Arizona

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 F. M. COCKE'S REJOINDER TO BUYERS' AND TRANSAMERICA'S REPLIES TO HIS MOTION TO SET ASIDE ORDER AND WRIT AND F. M. COCKE'S MOTION FOR FINDINGS AND CONCLUSIONS Filed: December 3, 1973

Defendant-counterclaimant F. M. Cocke hereby submits his Rejoinder to the Replies of plaintiff Buyers and of Transamerica, and respectfully moves the court for findings of fact and conclusions of law on the questions set forth below concerning new or additional evidence

disclosed by the Application For Writ of Assistance, etc., filed September 7, 1973, by the Order Granting Writ and by the Writ itself, issued October 31, 1973, all of which were prepared by Buyers.

REJOINDER

Buyers' claim of default is without merit. The cases they cite in support of the general rule, and the general rule, are not controlling here. The case that controls this point is Cocke v. Buyers v. Transamerica, and the point was decided by Buyers and the Court of Appeals. Buyers as appellees submitted to the jurisdiction of the Court of Appeals, thereby acknowledging same, by filing on September 10, 1973, their Motion to Refer File. The Court of Appeals exercised its jurisdiction by denying Buyers' Motion on October 2, 1973, and also by dismissing F. M. Cocke's appeal. Buyers and F. M. Cocke each had until October 17 to file motions for rehearing, and the trial court could not affect the rights of either by proceedings held therein prior to that date, particularly where one did not choose to cast doubt on his rights in the appellate courts by appearing.

Transamerica in its Response has carefully refrained from stating that F. M. Cocke submitted to the jurisdiction of this Court before the record was returned. Significantly, the Order granting the Writ was not entered, nor the Writ issued, until after the record was returned.

Much more significant, however, is the new or additional evidence submitted to this Court by Buyers' Application For Writ, the Order Granting Application For Writ,

and the Writ itself.

MOTION FOR FINDINGS AND CONCLUSIONS

I.

GROUNDS AND REASONS

This motion is filed on the grounds and for the reasons that:

1. The jurisdiction of the court in the original cause is always open to question in the enforcement of a writ of assistance. Earle v. McVeigh, 91 U.S. 503, 23 L.ed 398; Howard v. Milwaukee, etc., R. Co., 101 U.S. 837, 25 L.ed 1081; Terrell v. Allison, 21 Wall. 289, 22 L.ed 634;

2. The alterations in the escrow instructions manifest in the Order and Writ of October 31, 1973, are beyond the power or jurisdiction of this Court. Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318 (1967). Inasmuch as neither the Order nor the Writ can exceed the judgment on which they are based, Terrell v. Allison, supra, either the judgment in favor of Buyers is, or the Order and Writ are, void because beyond the power or jurisdiction of this Court;

3. The right to enforcement of the mandatory and self-executing terms of cancellation paragraph 18 or 24 if justified by the evidence, Harrison v. Fortlage, 161 U.S. 57, 40 L.ed 616, 16 S.Ct. 488, and the right to present evidence that such enforcement is justified, and to have judicial findings upon such evidence as a matter of due process, Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349,

80 L.ed 1209, 56 S.Ct. 797, are rights secured by the United States Constitution and laws, Truax v. Corrigan, 257, U.S. 312, 66 L.ed 254, 42 S.Ct. 124;

4. The right to such enforcement depends on the evidence which sustains this Court's ruling that F. M. Cocke failed and refused to comply with the agreement and escrow instructions.

II.

NEW OR ADDITIONAL EVIDENCE

A. THE ENFORCEMENT OF PARAGRAPH 18.

Buyers' Application For Writ of Assistance, etc., at page 5, lines 1-8, states:

> 5. On November 27, 1972, plaintiffs, in compliance with the judgment, contract and Escrow No. 02013111-7, paid over to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, the sum of $32,000 representing the balance of the second installment of $64,000 due from plaintiffs on January 2, 1969, after offsetting against the interest therein of FRANCIS M. COCKE the sum of $32,000 for the damages and costs awarded plaintiffs against defendant FRANCIS M. COCKE as set forth in the judgment.

Attached to Buyers' Application as Exhibit "K" is Buyers' letter to Transamerica dated August 29, 1973, demanding compliance by Transamerica with the judgment in favor

of Buyers. The first complete paragraph on page 2 of such letter states:

> As you also know, in early January, 1973, representatives of the plaintiffs were in your office, at which time they conferred with Mr. Martin, to whom this escrow was then assigned. And, at that time the plaintiffs deposited with Transamerica Title additional funds which were then deemed necessary by the plaintiffs and the agent of Transamerica Title to comply with the terms of the contract and escrow involved in this case in the event Mr. Cocke's appeal was untimely, as it was ultimately decided to be.

These statements establish that on November 27, 1972, and in early January, 1973, Buyers and Transamerica agreed between themselves that Buyers had not yet complied with the agreement and escrow instructions of October 9, 1968.

By letter dated March 6, 1969, Transamerica notified Buyers that they "must comply with all of the terms of the escrow on or before March 19, 1969, . . .". Copies of such letter and the enclosed notice of cancellation signed on March 5, 1969, by F. M. Cocke are attached hereto as Exhibit A.

It is well settled that expressions by a party to an escrow agreement, particularly where still in the executory state, as here, of mere willingness and ability to comply are immaterial to the question of actual compliance. 28 Am Jr 2d, Escrow,

Sections 21, 22, 24; 30A CJS, Escrows, Sections 10(a) and 10(b).

QUESTION NO. 1

In the light of this new or additional evidence, and as a matter of fact and law, upon what specific grounds, if any there be, can it now be held that the escrow did not become cancelled upon close of business March 19, 1969, by the mandatory and self-executing terms of paragraph 18?

B. THE ENFORCEMENT OF PARAGRAPH 24.

Fine print paragraph 24 of the escrow instructions specifies that in the event of the inability or unwillingness of the escrow agent to comply with the instructions, or the unwillingness of Transamerica to issue a title policy, all documents executed by one party only, which includes the deeds, shall be returned to such party. The Order of October 31, 1973, at page 2, lines 5-13, establishes such unwillingness of the escrow agent to comply and such unwillingness of Transamerica to issue its title policy. By letter dated March 10, 1969, the escrow agent demonstrated its inability or unwillingness to comply with the escrow instructions by notifying Sellers that Buyer was in compliance therewith. It is now admitted that they were not in compliance on March 10, 1969. (See Enforcement of Paragraph 18, above.)

QUESTION NO. 2

In view of this new and additional evidence of the early and recent inability or unwillingness of the escrow agent to comply and of Transamerica to issue its

policy, and as a matter of fact and law, upon what specific grounds, if any there be, can it now be held that the trustee Bank's deed and F. M. Cocke's deeds should not be promptly returned to them in accordance with the mandatory and self-executing terms of paragraph 24?

C. ALTERATIONS IN PARAGRAPH 24.

Paragraphs 1 and 2 under I above are incorporated herein by this reference.

As pointed out in "B" just above, in the event of the unwillingness of the escrow agent and of Transamerica as specified by paragraph 24, the mandatory and self-executing terms specify that the deeds shall be returned to the party who executed same. The Order at page 5, line 27, to page 6, line 1, and the Writ at page 2, lines 16-26, order that, now that such unwillingness has been established, such deeds be delivered to Minnesota Title instead of to the trustee Bank and to F. M. Cocke.

QUESTION NO. 3

In view of the alteration of paragraph 24 ordered by the Order and Writ, and as a matter of law, upon what grounds, if any there be, can it now be held, since neither the Order nor the Writ can exceed the judgment, that none of such three documents is void on its face for lack of jurisdiction to alter the terms of paragraph 24?

D. TRANSAMERICA INDISPENSABLE.

On November 13, 1973, F. M. Cocke filed an Amendment to his earlier motion to set aside the Order. Such Amendment, from

page 1, line 30, to page 2, line 20, is hereby incorporated herein by this reference.

That portion of the Order which admits and so establishes that the relief sought by Buyers' Complaint of April 22, 1969, could not be granted in the absence of the escrow agent and title insurer is found at page 3, line 5, to page 4, line 12. The same admission is found in the Writ at page 2, lines 16-22.

QUESTION NO. 4

In view of this new evidence, additional to that appearing on the face of Buyers' Complaint, and as a matter of fact and law, upon what grounds, if any there be, can it now be held that Transamerica was not an indispensable party to Buyers' action for specific performance of the agreement, as holder of Sellers' deeds and Buyers' money and mortgages and as title insurer?

E. EVIDENCE OF F. M. COCKE'S FAILURE TO COMPLY AND REPUDIATION OF THE TRUSTEE BANK'S DEED.

The judgment in favor of Buyers is attached to the Writ of Assistance as Exhibit A. At page 4, lines 11-25, the judgment recites the failure and refusal of F. M. Cocke to perform the duties assumed by him in the agreement and escrow instructions. At page 5, line 25, to page 6, line 10, the judgment repudiates the trustee Bank's deed to the trust half-interest in Parcel 1, and purportedly places on F. M. Cocke the burden of conveying all of Parcel 1 to Buyers. However, the instructions accompanying the deposit of the trustee Bank's

deed into escrow were accepted by all parties as part of the escrow instructions. It has never been disputed that F. M. Cocke's deeds were deposited into escrow by the broker on or about January 1, 1969, bearing the exact metes and bounds descriptions contained in the judgment, but subject to existing rights of way and easements and subject to the Notice of Lis Pendens filed in early 1966 by the State of Arizona in its eminent domain proceeding, which was pending throughout 1969. In view of the Lis Pendens, there was no basis whatsoever for Transamerica's announced unwillingness on March 20, 1969, to issue its title policy on Parcel 2 because of the $6.00 Triangle, so putting an end to the agreement under paragraph 24, unless already cancelled at close of business the day before under paragraph 18. It has never been disputed that the only objection to the deed to F. M. Cocke's Parcel 2 was Transamerica's objection, later abandoned, to the $6.00 Triangle. The metes and bounds descriptions in the judgment also admit that Buyers' demand, never retracted, for a warranty deed from F. M. Cocke and the trustee Bank to Parcels 1A and 2A, as a condition precedent to payment of the $64,000 represented by the unacceptable personal checks, constituted, without more, repudiation of the agreement.

QUESTION NO. 5

Other than his failure to join in the repudiation of the trustee Bank's deed and instructions, and as a matter of fact and law, upon what act or failure to act of F. M. Cocke did this Court rule that he failed to perform the duties assumed by him under the agreement and instructions of October 9, 1968?

Respectfully submitted this
3rd day of December, 1973.

/s/ L. Alton Riggs, Jr.

By: L. Alton Riggs, Jr.
1540 E. University, Suite 200
Mesa, Arizona 85203
Attorney for Defendant
Francis M. Cocke

(Hand-delivered July 29, 1974)

NOTICE

TO: THE SHERIFF OF MARICOPA COUNTY

RE: LAND IN POSSESSION OF F. M. COCKE

Arizona Revised Statutes Section 11-450 makes it clear that the letter dated July 11, 1974, dictated by Don Kenney and signed by Sgt. Carlson, did not discharge or excuse the Sheriff from liability for neglect or misconduct in any actual seizure of possession from F. M. Cocke by the deputies or in any formal placing of the land in the possession of C. W. Jackson Company. This company is not mentioned in the process served on F. M. Cocke or in the letter of July 11, 1974. The Kenney letter also falsely states that plaintiffs furnished warranty deeds from Minnesota Title and First National Bank of Arizona (See ARS 33-402).

This process included three documents: (1) the judgment entered in case C-222472 by Irwin S. Cantor on September 27, 1972, in favor of plaintiffs James Stewart Company, M. Seth Horne and Maurine D. Horne, (2) the Order Granting Writ of Assistance, etc., entered October 31, 1973, and (3) the Writ itself. Plaintiffs themselves have never been in possession, having since October 31, 1973, never obtained a further court order that they had complied with the contract and escrow instructions, which is the condition precedent to close of the escrow and seizure of possession expressly and repeatedly set forth in the Order and Writ.

It has long been settled, as pointed out in Schuster v. Merrill (1940) 56 Ariz. 114, 106 P.2d, that "ALL PROCESS AND ORDERS REGULAR ON THEIR FACE AND ISSUED BY COMPETENT AUTHORITY," contained in ARS Section 11-447, means process which is legal in form and contains nothing to notify or fairly apprise any one that it was issued without authority.

The long standing and fundamental rule as to modification of a contract by a court is well stated in Goodman v. Newzona Investment Co. (1966), 101 Ariz. 470, 421 P.2d 318:

> . . .It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Graham County Electric Co-op, Inc. v. Town of Safford, 95 Ariz. 174, 383 P.2d 169. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. Neale v. Hinchcliffe, 21 Ariz. 452, 189 P. 1116.

The judgment beginning at page 8, line 24, states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall

> serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby.

The Order beginning at page 2, line 5, points to the unwillingness of Transamerica to close the escrow in accordance with the contract and escrow instructions as modified by the judgment, or in any manner act in connection with said escrow or the closing thereof. Without more, this statement fairly apprises any one that Transamerica was unwilling to issue its title policy or close the escrow as modified.

Beginning at page 2, line 14, the Order states:

> IT FURTHER APPEARING to the Court that the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated its willingness to be appointed pursuant to order of this Court to act for and in the place and stead of the defendant TRANSAMERICA TITLE CO. for the purpose of closing said Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, and such

> instructions as are issued by the Court pursuant to this proceedings; and. . .

It is clear from this statement that the actual escrow agreement between the parties was rewritten into a completely new escrow agreement, with Minnesota Title as escrow agent.

The Order beginning at page 2, line 29, states that plaintiffs are entitled to have the escrow closed in accordance with the contract and escrow instructions as modified, not as entered into by the parties. Further, the Order refers to the actual agreement between the parties, as modified by the judgment or the Order at page 3, line 17, page 4, line 4, page 4, line 28, and at page 5, line 19.

Contradictory to all these references to the actual contract and escrow instructions as modified, is the following statement at page 3, lines 20-28, of the Order, specifying that the rights, privileges and duties of Minnesota Title are those, and only those, actually agreed to by the parties:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, substituted as escrow agent with all of the rights, privileges and duties of the defendant TRANSAMERICA TITLE CO. for the purpose of proceeding with and closing Escrow No. 02013111-7, all as set forth in the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co.

as buyer and Francis M. Cocke
and Joan H. Cocke as sellers;
and. . .

Likewise the Writ of Assistance in its first paragraph states that plaintiffs were entitled to specific performance by F. M. Cocke (only one of the four principal parties) of the actual contract and escrow instructions entered into on October 9, 1968, but refers to such contract and escrow instructions as modified by the judgment and Order at page 2, line 6, page 2, line 25, and at page 2, line 31.

The condition precedent to close of escrow and any taking of possession by plaintiffs is repeatedly stated in the Order and Writ as compliance by plaintiffs with the contract and escrow instructions as modified by the judgment and Order, but the rights, privileges and duties of Minnesota Title to close the escrow are expressly limited by the Order at page 3, lines 20-28 (quoted hereinabove at page 3) to those set forth in the actual contract and escrow instructions. These contradictory specifications, without more, constitute sufficient warning that the judgment, Order and Writ modified the actual agreement of the parties without authority, and that any determination by the Sheriff that the limitation on Minnesota's powers is to be stricken or ignored has been made at his own risk.

Attached to this Notice are copies of Arizona Revised Statutes Sections 33-402, 11-450, and 11-447. Also attached are copies of Schuster v. Merrill, 36A Words and Phrases, Permanent Edition, "Regular On Its Face", Pankewicz v. Jess, quoted by Words and Phrases, and Goodman

v. Newzona, in part.

Dated this twenty-ninth day of July, 1974.

/s/ Francis M. Cocke
FRANCIS M. COCKE
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 29th day of July, 1974, by FRANCIS M. COCKE.

In witness whereof I herewith set my hand and official seal.

/s/ Vera B. Arnold
Notary Public

My commission expires:

June 16, 1975

Letter from:

OFFICE OF THE MARICOPA COUNTY ATTORNEY

August 1, 1974

Kelly & Corbin
Attorneys at Law
3003 North Central
Suite 2300
Phoenix, Arizona 85012

Re: James Stewart Co. v. Cocke;
No. C-222472

Gentlemen:

Please be advised that this office represents the Maricopa County Sheriff's department as special counsel. The sheriff's office has requested that I review the Writ of Assistance signed by Judge Cantor on October 3, 1973, in the above case.

Mr. Cocke, the defendant in the above action, has gone to Sheriff Blubaum himself; Judge Boyd in Tempe; and has threatened the sheriff's office directly with civil suit if the sheriff's office proceeds to carry out the Writ of Assistance. Mr. Cocke claims that the condition precedent required of the plaintiff according to Judge Cantor's orders specifically commencing at line 27 on page two of the writ in question has not been complied with.

We have advised Mr. Cocke that it is not the function of the sheriff's office to ascertain or determine the validity of

the writ, however, in view of the above set forth condition precedent which is clearly on the face of the writ, the sheriff's office feels that they must have substantiation from your office that the condition required by the writ has been complied with. Further, we request that you furnish the sheriff's office a letter of indemnity along with the evidence that you furnish to substantiate the completion of the condition precedent. The sheriff's office will continue to keep the peace on the property in question but can do nothing further to enforce the writ until such time as they have the items requested herein. Would you please furnish the original of your indemnity letter and whatever evidence you might have to Lt. Pena, Civil Division, and send a copy to my office at 237 East Virginia, Phoenix, Arizona 85004. Should you have any questions, please do not hesitate to call me at 254-5311. Thank you.

Sincerely,

MOISE BERGER, COUNTY ATTORNEY

Donald J. Kenney
Special Counsel - Sheriff

DJK:mt

cc: Francis Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 ACCOUNT OF COURT-APPOINTED OFFICER; PETITION FOR APPROVAL AND APPLICATION FOR INSTRUCTIONS AND FOR DISTRIBUTIONS. Filed: August 7, 1974

Petitioner, TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, maintaining its offices at 3003 North Central Avenue, Phoenix, Arizona 85012, and the court-appointed officer pursuant to an order of this Court duly made and entered on October 31, 1973, which has acted and is acting pursuant to a Writ of Assistance issued by the above-entitled Court pursuant to said order of October 31, 1973, respectfully states unto the Court as follows:

1. Pursuant to the Writ of Assistance issued by the above-entitled Court commanding Petitioner to obtain possession of the files relating to TRANSAMERICA TITLE INSURANCE CO. Escrow No. 0201311-7, including all documents, deeds, deposits and instructions constituting the files of said escrow and proceed to close said escrow, your Petitioner obtained said files and proceeded with the closing of the escrow as commanded by the Writ of Assistance in accordance with the Contract and Escrow Instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyer, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, as modified by the Judgment dated September 27, 1972, and the order dated October 31, 1973, granting the Application for Writ of Assistance, or, Alternatively, For An Order Requiring Compliance With Judgment Dated September 27, 1972, Or For A Supplemental Bill Enforcing Said Judgment; that said escrow was identified in Petitioner's office as Escrow No. 20-000,616.

2. In connection with the closing of said escrow, your Petitioner effected the transfer of legal title of the real property in question herein to the plaintiffs, subject to compliance by the plaintiffs with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968, between JAMES STEWART CO., as buyer, and FRANCIS M. COCKE and JOAN H. COCKE. as sellers, as modified by the Judgment entered and filed by this Court on September 27, 1972 and the Order of October 31, 1973; that plaintiffs did comply with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968 and your Petitioner closed the said escrow on December 20, 1973, at which time title to the real

estate, the subject of the Contract and Escrow Instructions entered into on October 9, 1968, was transferred to JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE, his wife; that attached hereto, marked Exhibit "A" and incorporated herein for reference is a copy of the Escrow Settlement Statement which reflects the charges against and credits to the plaintiffs herein as buyers and the charges against and credits to the said FRANCIS M. COCKE and JOAN H. COCKE, as sellers, according to their respective interests including, but not limited to, the receipt of funds paid outside of escrow by the plaintiffs, amounts transferred from the escrow opened by TRANSAMERICA TITLE INSURANCE COMPANY as No. 02013111-7; purchase money mortgages received from plaintiffs payable to FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests, costs and attorneys' fees charged against the interest of FRANCIS M. COCKE by TRANSAMERICA TITLE INSURANCE CO. per Judgment of this Court, damages due plaintiffs, together with interests and costs of suit in the aggregate amount of $52,054.58 due and owing pursuant to the Judgment in favor of the plaintiffs dated December 27, 1972, and an advance to FRANCIS M. COCKE on January 13, 1969 of $20,000.00 paid by TRANSAMERICA TITLE INSURANCE COMPANY; that your Petitioner also paid to ARLEIGH H. BURTON as a part of closing said escrow on behalf of FRANCIS M. COCKE and JOAN H. COCKE according to their respective interests, $10,000.00 of the total sum of $17,971.97 for the real estate commissions, including interest at six percent per annum as provided by said Contract and Esrow Instructions; that as a result of said closing, there remained a deficiency in closing

fees and costs against the interest of FRANCIS M. COCKE in the amount of $8,240.80; that in connection with the closing of said escrow, your Petitioner remitted to JOAN H. COCKE the sum of $21,210.84; that also in connection with said closing, your Petitioner granted two easements pursuant to the Contract and Escrow Instructions dated October 9, 1968, copies of which are attached hereto and marked Exhibits "B" and "C", respectively; that attached hereto and marked Exhibit "D" is a copy of the deed by which your Petitioner transferred legal title to the subject property to plaintiffs.

3. That the Contract and Escrow Instructions entered into between JAMES STEWART CO., as buyer, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, provided the buyer with the right and privilege to make additional payments to the unpaid balance of the purchase money mortgage at any time following January 2, 1969; that on July 1, 1974, plaintiffs prepaid the full amount of the unpaid balance of the purchase money mortgages received by your Petitioner on behalf of FRANCIS M. COCKE and JOAN H. COCKE, in connection with the closing of said escrow, i.e., $420,238.15, plus interest in the amount of $13,253.31, through July 1, 1974; that against the interest of FRANCIS M. COCKE in said proceeds, your Petitioner charged the shortage in closing fees and costs of $8,240.80, leaving the net received as a result of the prepayment by plaintiffs of $425,520.66.

4. On July 10, 1974, your Petitioner paid in full a mortgage due the Federal Land Bank Association, on the real estate the subject of the Contract and Escrow

Instructions entered into on October 9, 1968, in the sum of $34,802.88, for the purpose of clearing the title for the subject property to the plaintiffs; that with respect to the remaining proceeds, i.e., $390,447.78, your Petitioner has deposited substantially all of said proceeds in certificates of deposits, or pass book savings accounts according to the respective interests of FRANCIS M. COCKE and JOAN H. COCKE.

5. Attached hereto and marked Exhibits "E" and "F", and incorporated herein by reference, are copies of the escrow settlement documents reflecting the amounts due FRANCIS M. COCKE and JOAN H. COCKE as a result of the prepayment by plaintiffs on July 1, 1974, in the respective amounts of $278,216.02 and $94,259.79, together with the commission due ARLEIGH H. BURTON, charged against the respective interests of FRANCIS M. COCKE and JOAN H. COCKE.

6. In connection with the aforesaid prepayment, your Petitioner pursuant to the Writ of Assistance issued by this Court on October 31, 1973, executed on behalf of FRANCIS M. COCKE and JOAN H. COCKE, satisfaction of the mortgages given by plaintiffs at the initial closing of the escrow on December 20, 1973.

7. Pursuant to the Writ of Assistance, Or, Alternatively, Order Requiring Compliance With Judgment Dated December 27, 1972, Or Supplemental Bill Enforcing Said Judgment as issued out of this Court on October 31, 1973, your Petitioner has faithfully performed all things commanded of it by the above-entitled Court, including but not limited to obtaining the files relating to TRANSAMERICA TITLE CO. Escrow

No. 02013111-7, the closing of said escrow on December 20, 1973, the preparation of all documents and deeds necessary to effect the said closing, accounting for the fees and charges to and for the plaintiffs and FRANCIS M. COCKE and JOAN H. COCKE according to their respective interests, receiving and accounting for the payment in full on July 1, 1974 and depositing said proceeds, and your Petitioner now requests an order of the Court approving all acts and things done by it or taken by it for and on behalf of FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests and the further order of the Court providing for distribution of the proceeds to FRANCIS M. COCKE, JOAN H. COCKE and ARLEIGH R. BURTON, according to their respective interests.

WHEREFORE, your Petitioner prays for an order of the Court as follows:

1. Approving the closing of the escrow as alleged herein including but not limited to the following:

(a) The settlement of the escrow as reflected by Exhibit "A" attached hereto;

(b) The disbursement of proceeds of the sale to JOAN H. COCKE of $21,210.84;

(c) The easements granted under the Contract and Escrow Instructions dated October 9, 1968, copies of which are attached hereto as Exhibits "B" and "C";

(d) The deed executed by your Petitioner on behalf of FRANCIS M. COCKE, copy of which is attached hereto as Exhibit "E".

2. Approving the acceptance of the prepayment by the plaintiffs, JAMES STEWART CO. and SETH HORNE and MAURINE D. HORNE, and the satisfaction of mortgages in connection therewith;

3. Approving the deposit of funds received by your Petitioner in certificates of deposits and savings accounts pending distribution of same;

4. Approving all other acts and things done by your Petitioner on behalf of the sellers FRANCIS M. COCKE and JOAN H. COCKE in connection with the Contract and Escrow Instructions dated October 9, 1968, and the prepayment of the mortgages received from the buyers JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE, on September 20, 1973; and

5. For such other and further relief as to the Court may seem just, proper and necessary in the premises.

Respectfully submitted this 7th day of August, 1974.

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorce man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	NO. C-222472 ORDER TO SHOW CAUSE Filed: August 7, 1974

THE STATE OF ARIZONA TO:

TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, by and through its attorneys, Powell B. Gillenwater, Browder and Gillenwater, 3003 North Central Avenue, Suite 2304, Phoenix, Arizona 85012

JOAN H. COCKE, by and through her attorney, Loretta Whitney, 603 Luhrs Building, Phoenix, Arizona 85003

DOROTHY H. COCKE and ELIZABETH C. COCKE, by and through their attorney, George Sorenson, Jr., 609 Luhrs Building, Phoenix, Arizona 85003

FRANCIS M. COCKE, by and through his attorney, L. Alton Riggs, Jr., 48 North MacDonald Street, Mesa, Arizona 85201, and FRANCIS M. COCKE, In Proper, 1320 South Priest Road, Tempe, Arizona,

G R E E T I N G S :

TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, having filed its verified Account of Court-Appointed officer; Petition for Approval and Application for Instructions and for Distributions, and the Court having read and considered said verified Petition, and good cause appearing therefor,

NOW THEREFORE, IT IS ORDERED that each of the above named parties be and appear in Division 7 of this Court on the 28th day of August, 1974, at the hour of 4:00 o'clock, P.M., then and there to show cause if any they may have why the relief prayed for in said Petition should not be granted.

DONE IN OPEN COURT this 7th day of August, 1974.

/s/ Irwin Cantor
Judge of the Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE E. HORNE, his wife, Plaintiffs, v. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 F. M. COCKE'S RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO VACATE OR SET ASIDE ORDER GRANTING WRIT OF ASSISTANCE, AND THE WRIT ITSELF Filed: August 28, 1974

Comes now Francis M. Cocke and responding to the Order to Show Cause entered August 7, 1974, moves the Court to vacate or set aside the Order Granting Writ of Assistance, etc., and the Writ itself, entered October 31, 1973, upon the following grounds.

1. The trial court hearing on issuance of the Order Granting Writ was held October 12, 1973, at which time jurisdiction remained in the Court of

Appeals, and the Order Granting Writ, and the Writ, were and are therefore void on the face of the record, and were and are without force or effect. The significant dates are as follows:

Sep. 7, 1973	Buyers filed Application to the Superior Court for Writ of Assistance, and said court entered its Order to Show Cause why the Writ should not be granted.
Sep.10, 1973	Buyers filed in the Arizona Court of Appeals their Motion to Refer File back to the Superior Court.
Oct. 2, 1973	Appellate court denied Buyers' Motion to Refer File, and granted Transamerica's motion to dismiss F. M. Cocke's appeal as to Transamerica, which involved Buyers' rights.
Oct.12, 1973	Hearing held in superior court on Buyers' Motion for Writ of Assistance. F. M. Cocke made no appearance, choosing not to so prejudice his rights in the appellate court.
Oct.17, 1973	Last day for Buyers to file in appelate court for rehearing on denial of their Motion to Refer File, and last day for F. M. Cocke to file

for rehearing in appellate court on dismissal of his appeal as to Transamerica.

Oct.30, 1973 Arizona Court of Appeals returned file to superior court.

Oct.31, 1973 Order Granting Writ of Assistance, stating that it was based on the Oct. 12, 1973 hearing, entered in trial court.

No hearing was held after jurisdiction was returned to the superior court. The entry of the Order Granting Writ, without a hearing within the jurisdiction of the Court, was wanting in due process of law.

2. The Order Granting Writ, and the Writ, were and are void on their faces, being in violation of ARS Title 6, Chapter 7, Section 6-811, and so beyond the power or jurisdiction of the Court, and such Order and Writ were and are without force or effect.

Section 6-811 specifies that the term "escrow agent" shall not include any person doing any of the acts specified in paragraph 1 of Section 6-801, which defines "Escrow", under the order of a court.

The Order Granting Writ, at page 3, lines 20-28, states that it is ordered that Title Insurance Company of Minnesota be, and it is hereby, substituted as escrow agent with all the rights, privileges and duties of Transamerica for the purpose of proceeding with and closing

the escrow, all as set forth in the escrow agreement entered into on October 9, 1968 (without modification). The entries of the Order Granting Writ on October 31, 1973, and the Writ, being beyond the power or jurisdiction of the Court, were wanting in due process of law.

3. The judgment entered September 27, 1972, and the Order Granting Writ, and the Writ, were served as purported process on F. M. Cocke by county sheriff's deputies on or about July 11, 1974. Each of these documents shows on its fact that it was entered in attempted enforcement of a contract as modified by such judgment or order, and such process was and is therefore void on its face and was wanting in due process of law, such modification not being within the province or power of the Court.

All three of the separate judgments entered in C-222472 against F. M. Cocke, in favor of Joan H. Cocke, Transamerica, and the Buyers, as well as the orders or judgments against him and in favor of Joan H. Cocke entered in case D-89833 subsequent to the final judgment of March, 1967 in that case, have been sought to be carried into execution by the C-222472 judgment entered September 27, 1972, in favor of the Buyers, and by the Order Granting Writ of Assistance, and the Writ itself, entered in C-222472 on October 31, 1973. The service of such three documents was in purported execution of such C-222472 and D-89833 judgments and orders, and the delivery thereof to the sheriff for execution was wanting in due process of law.

Such process recites at least ten

times that the contract sought to be enforced thereby has been modified by the judgment entered September 27, 1972 or the Order entered October 31, 1973, or both, so establishing such modifications, and that such process was and is therefore beyond the Court's jurisdiction and without force or effect, being void on its face, because on its face it is not subject to execution under ARS Section 11-447. It is the process itself which modifies the agreement entered into by the parties, and no court has authority to issue process which modifies a contract.

For the foregoing reasons this defendant respectfully moves this Honorable Court to vacate or set aside the Order Granting Writ of Assistance, etc., and the Writ itself, entered October 31, 1973.

Respectfully submitted this 28th day of August, 1974.

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
1540 East University, Suite 200
Mesa, Arizona 85203
Attorney for Defendant
Francis M. Cocke

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR
THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim of F. M. Cocke.	NO. C-222472 NOTICE OF APPEAL TO COURT OF APPEALS, DIVISION I

Filed: November 27, 1974

Notice is hereby given that the above-named defendant-counter and cross claimant Francis M. Cocke appeals to the Court of Appeals of the State of Arizona from the following orders and judgments made and entered in the above entitled court in the above entitled action:

1. The Order Approving Account of Court-Appointed Officer and Petition for Approval and Application for Instructions and for Distributions entered September 30, 1974;

2. The Writ of Assistance, or, Alternatively, Order Requiring Compliance with Judgment Dated September 27, 1972, or Supplemental Bill Enforcing Said Judgment, entered October 31, 1973;

3. The Order Granting Application for Writ of Assistance, or, Alternatively, Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing Said Judgment, entered October 31, 1973;

4. The Second Amended Judgment in favor of plaintiffs and against counter-claimant Francis M. Cocke entered September 27, 1972, including Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law attached to said Judgment;

5. The Judgment in Favor of Cross-Defendant Joan H. Cocke and Against Cross-Claimant Francis M. Cocke, entered November 10, 1970;

6. The Summary Judgments in favor of counter-defendant Transamerica Title Insurance Company and against counter-claimant Francis M. Cocke entered November 10, 1970, and the Order Modifying said Judgment of November 10, 1970, and Judgment on Supersedeas and Cost Bonds, entered November 6, 1972; and

7. Each and every order merged in any of the above orders and judgments.

As bond for costs on appeal, a cashier's check in favor of the Clerk of the Superior Court in the amount of $250.00 is filed herewith.

While it might appear that the appeal of all judgments and orders included in numbered paragraphs 2 through 7 above at this time is untimely, said appeal should not be deemed to be untimely for the reason that the September 27, 1972, judgment which embodies and attempts to enforce all of the prior judgments is a conditional judgment and hence not a final judgment for the reasons more particularly set forth below. The last sentence of the September 27, 1972, judgment states:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby.
>
> (emphasis added)

As stated, the force and effect of said judgment on the interest in and title to the property is conditioned on the plaintiffs' compliance not with the actual contract made by the parties but by said contract as modified by the judgment.

The conditions were not complied with by plaintiffs as late as October 31, 1973, because the Order Granting Writ, entered on October 31, 1973, after finding that Transamerica was no longer willing to act in any manner in connection with the escrow as modified by the judgment, ordered Minnesota Title as an officer of the court to effectuate the closing of the escrow and the transfer of legal title to the plaintiffs, subject to compliance by the plaintiffs with the contract and escrow instructions as modified by the judgment entered on September 27, 1972, and said order.

The Writ of Assistance itself commanded Minnesota Title to obtain the escrow file from Transamerica and to proceed with the closing of the escrow in accordance with the contract and escrow instructions as modified by the judgment and the order.

Accordingly, it was not until September 30, 1974, that the lower court declared that the conditions required in the September 27, 1972, judgment had been met.

Respectfully submitted this 27th day of November, 1974.

/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorney for Francis M. Cocke
231 North Alma School Road
Mesa, Arizona 85201

Supreme Court, U. S.
FILED
OCT 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

(Six Volumes)

RICHARD L. THOMPSON
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Counsel for Petitioner

VOLUME VI

Pages 501-604

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	)	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 MOTION TO DISMISS APPEAL Dated: January 30, 1975 Received: February 3, 1975

Appellees, James Stewart Company, M. Seth Horne, Maurine D. Horne, and Title Insurance Company of Minnesota (the Officer of the Court appointed pursuant to Order entered on October, 1973), by and through their counsel undersigned, respectfully move the Court to dismiss this appeal pursuant to Rules 4(a) and 7(d) of the Rules of the Supreme Court of Arizona on the grounds that the appeal is (1) frivolous and (2) untimely, as more fully set forth in the attached Memorandum of Points and Authorities.

The appellees further move, pursuant to Section 12-2106 of the Arizona Revised Statutes, for sanctions against the

appellant, Francis M. Cocke and Section 32-263 of the Arizona Revised Statutes for sanctions against the appellant's attorney, L. Alton Riggs, Jr., on the grounds that they did not in good faith institute this appeal as more fully set forth in the attached Memorandum of Points and Authorities.

The foregoing Motion is made on behalf of appellees, James Stewart Company, M. Seth Horne, and Maurine D. Horne, who have always been parties to this litigation. In addition, the Motion is made on behalf of the Title Insurance Company of Minnesota who, although not named in the caption of this appeal, has acted on behalf of the Court in the stead of Transamerica Title Insurance Company of Arizona in closing the escrow pursuant to the judgment of specific performance.

Respectfully submitted,

KELLY & CORBIN

/s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

TANNER, JARVIS, OWENS & HOYT

/s/ Wallace O. Tanner
Wallace O. Tanner
3800 North Central
Phoenix, Arizona 85012
Attorneys for Appellees

MEMORANDUM OF POINTS AND AUTHORITIES

UNTIMELINESS

It has been continually held that an appeal must be taken within 60 days from the filing of a formal written judgment or appealable order, and that failure to perfect the appeal within that time is jurisdictional. Harbel Oil Company v. Steele, 80 Ariz. 368, 298 P2d 798 (1956); State v. Burmingham, 96 Ariz. 100, 392 P2d 775 (1964); City of Tucson v. Wondergem, 4 Ariz. 291, 419 P2d 551 (1966); Edwards v. Young, 107 Ariz. 283, 486 P2d 181 (1971).

Even a cursory examination of the record on appeal shows that the appellant is once again attempting to relitigate issues long ago decided in both the trial court and appellate courts. The appellant attempts to do this under the guise of appealing from an order of the lower court approving the account of a court-appointed officer whose appointment was secured to insure the carrying out of a judgment of the court rendered on September 27, 1972.

The appellant previously appealed from the judgment of September 27, 1972 on January 4, 1973. By that appeal, the appellant attempted to raise the same issues which are now being raised. Upon motion of appellees, Stewart and Hornes, this Court in the former appeal held that the appeal was untimely and granted dismissal thereof. It is inconceivable that the appellant can now claim a right to appeal those same issues over two years later in this proceeding.

As to the Order Approving the Account of Court-Appointed Officer and Petition for Approval and Application for Instructions and for Distributions entered in the Superior Court on September 30, 1974, appellant has raised no substantial issues worthy of appellate review. In the Court below, the appellant's objections stemmed almost exclusively from contentions that the Title Insurance Company of Minnesota was not a duly qualified agent to act in assisting the Court in enforcing its judgment. These allegations in no way go to the merits of the account which was approved by the Court. Instead, his objections stemmed back to the judgment of September 27, 1972 and beyond.

As to any other objections which might be raised to the acts of the Title Insurance Company of Minnesota, it is clear that the proper time for raising such objections in the trial court or in an appellate court would have been following the Order granting those powers which was entered on October 31, 1973.

The appellant was fully apprised of the hearing on said Order and the entry of said Order and failed to participate in the proceeding or to take any other action in either the Superior Court or in the appellate courts concerning said Order. At this point, the appellant is well outside the 60-day period required to perfect his appeal to the merits of the appointment of the Title Insurance Company of Minnesota.

FRIVOLITY

That the appellant does not raise any new or substantial issues is clearly seen

from his filings with this Court and his Notice of Appeal filed in the Superior Court. Included in the appellant's filings is a Motion to Transfer and Use Abstract of Record. By that motion, appellant seeks to transfer the record of the previous appeal, consisting of some 13 volumes to the present proceeding. Clearly, if appellant were seeking to review some new and currently appealable order, such a task would be unnecessary.

The appellant in trying to reopen issues long ago settled argues that those past orders and judgments were conditional. Even disregarding the lack of merit of such a contention, it is obvious that this argument would have to have been raised on the previous appeal. Should the rule be otherwise, there would be no end to attempts by unsuccesssful litigants to find error in stale judgments against them.

In the case of Ferguson v. Superior Court, 59 Ariz. 314, 127 P2d 131 (1942), the Supreme Court granted a motion to dismiss an appeal on the basis that no valid appealable judgment was rendered in the trial court. The true facts were that a valid judgment had been rendered but did not show because of an error on the record. The Court found on a subsequent appeal that after the dismissal the Superior Court had no power to alter the record. The Court stated at page 133:

> "* * * The rule is, when a judgment is affirmed by this court, all questions raised by the assignments of error and all questions that might have been so raised

> are to be regarded as finally adjudicated against the appellant. * * *", and we have followed this rule consistently ever since. Sam v. State, 33 Ariz. 421, 265 P. 622; State v. Griffith, 54 Ariz. 436, 96 P2d 752.

Such is the principal of res judicata. Whether the alleged orders and judgments were conditional or not, once appellant has challenged those orders and judgments both in the trial court and on appeal, he is prevented from again challenging them on grounds that might have been raised previously.

SANCTIONS

In addition to asking that this appeal be dismissed, the aforesaid appellees are requesting that they be awarded costs and attorney's fees in accordance with Section 12-2106 of the Arizona Revised Statutes. There can be no question that this appeal is both untimely and frivolous.

Section 12-2106 provides a penalty of an amount up to ten percent of the judgment appealed from. The judgment entered on September 27, 1972, in part provided as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of

Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), said amount being for:

Consulting and Architectural Fees	-	$ 6,349.00
Salaries and Office Overhead	-	18,895.86
Interest on Money in Project	-	21,760.00

Therefore the appellees are entitled to up to $4,700.48 as damages for taking this appeal.

The appellant's continued filings both in the State and Federal courts at this point amount to little more than harrassment.

The Supreme Court in the case of Mosher v. Young, 50 Ariz. 389, 72 P2d 682 (1937), in awarding damages for a frivolous appeal, stated at page 683 as follows:

> * * * The record shows, from start to finish a studied effort on the part of the appellant to delay the appellee in the collection of an honest debt for money loaned appellant by appellee. * * *

The same type of studied effort has been involved in this case. The appellant has strained the appellees' efforts to achieve and enforce their judgment to unreasonable limits. Despite voluminous filings in the trial court and on appeal, the appellees steadfastly pursued their rights and finally achieved judgment. Thereafter, the appellant refused to recognize the judgment and the appellees

were subjected to numerous other legal proceedings in an attempt to insure the enforceability of their judgment.

The time and effort by appellees' counsel in these matters has far surpassed what normally should be required to obtain relief through the courts. Despite this, appellant persists in burdening the appellees and this Court with another appeal.

It is doubtful that the appellant will ever recognize the validity of the judgment against him. However, it is certainly time that the appellees receive some monetary relief for the tasks they are being put to.

This Court has seen fit to award damages under Section 12-2106 on previous occasions. Compass Realty & Investment Corp. v. A.A. Refrigeration & Heating, Inc., 21 Ariz. App. 214, 517 P2d 1107 (1974); Gangadean v. Byrne, 16 Ariz. App. 112, 491 P2d 501 (1971).

It is obvious at this point that the only claim that appellant can legitimately raise is disappointment, not legal aggrievement. As was stated in the recent case of Compass Realty, supra at page 1109:

> * * * Mere disappointment with a particular result does not constitute aggrievement sufficient to support an appeal. * * *

As to the frivolity of the appellant's objections to the account of Title Insurance Company of Minnesota, all that need be done is to look to the objections

raised in the Superior Court. None of the objections specified go to the accuracy or completeness of the account. Instead, the appellant used the date of approving the account as the springboard for raising old arguments on appeal.

The appellant has, of course, used this tactic before. On the previous appeal to this Court, the appellant appealed an order awarding of attorney's fees to appellee, Transamerica Title Insurance Company of Arizona. In the appellees' memorandum in support of its motion to dismiss, it was stated at page 2 as follows:

> * * * At the hearing, there was no objection, written or oral, as to the necessity, reasonableness or amount of attorney's fees for for that matter, to the modifications of the judgment in accordance with this Court's opinion. Likewise, there is no issue raised in this appeal as to the necessity, reasonableness or amount of attorney's fees. The sole objections to the entry of Modified Judgment are found in "F. M. Cocke's Response to Transamerica's Motion to Modify Judgment" (Ab. 895), and consist of a poorly disquised attempt to reassert and reargue before the trial court contentions that have been fully disposed of by the written opinion of this Court. * * *

This Court has previously recognized the frivolity of the issues presented by the appellant. In the previous appeal in

granting the motion to dismiss by appellee Transamerica Title Insurance Company of Arizona, this Court stated:

> It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title Insurance Company is frivolous.

The Court, however, declined at that time to impose damages under Section 12-2106. Once again, the appellees are faced with answering a frivolous appeal involving these same issues and, therefore, should be entitled to the statutory sanctions.

Throughout this litigation the appellant has been represented by the same counsel. The appellees have been forced to assume a tremendous burden in financing the defense in these continuous appeals. The good faith of the appellant's counsel in taking these repeated appeals has been questioned by the Court before in the case of Cocke v. Transamerica Title Insurance Company of Arizona, 16 Ariz. App. 556, 494 P2d 756 (1972). There it was stated as follows at page 758:

> * * * To argue at this late date that the beneficiaries of the trust still have an interest in disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court but calls into serious question the advocacy of appellant's counsel. * * *

The fact that appellant continues to refuse to recognize the validity of the multitude of judicial decisions rejecting

his claims and that appellant's counsel continues to aid the appellant in his harrassing endeavors would seem to warrant the Court to not only impose damages against the appellant, but also to elicit a reprimand of the appellant's counsel for violating his duties under Section 32-263(3) of the Arizona Revised Statutes.

In the case of Tovar v. State, 39 Ariz. 528, 8 P2d 247 (1932) the Supreme Court recognized the power to impose sanctions under this section against attorneys taking frivolous appeals on behalf of their clients. The Court, in commenting on a prevalent practice in criminal appeals, stated as follows at page 248:

> * * * If, however, the attorney does not honestly believe that there is merit in the appeal to the extent that he is willing at least to file a brief in support thereof, he is guilty of a serious violation of professional conduct, which might justify disciplinary action by this Court...* * *

This situation is in many ways analogous to an attorney who continually raises issues long ago decided in previous judicial proceedings.

On the basis of the foregoing, it is respectfully requested that this Court dismiss the current appeal, award $4,700.48 to the appellees as and for damages in connection with this appeal, and make such other orders as it deems just and proper against the appellant's attorney for his part in this appeal.

SUBMITTED this 30th day of January, 1975.

KELLY & CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

TANNER, JARVIS, OWENS & HOYT

By /s/ Wallace O. Tanner
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Attorneys for Appellees

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 MARICOPA County Superior Court No. C-222472 RESPONSE TO MOTIONS TO DISMISS APPEAL AND FOR SANCTIONS OF APPELLEES STEWART-HORNE AND MINNESOTA TITLE

Filed: February 10, 1975

MEMORANDUM OF POINTS
AND AUTHORITIES

TIMELINESS

Appellant has no dispute with the cases cited in the first paragraph of Appellees' Memorandum.

However, appellees apparently have failed to take into consideration the fact that the Judgment entered September 27, 1972 (A.), was a conditional judgment, and hence not a final or appealable judgment.

As more particularly set forth below, the force and effect of the judgment, as specified on its face, must await the fulfillment of two conditions. In the next

to last paragraph of the judgment, F. M. Cocke, upon compliance by Plaintiffs (appellees Stewart-Horne) with the contract as made by the parties on October 9, 1968, is ordered to perform all obligations necessary, in accordance with such contract, to convey the subject property.

In the last paragraph of the judgment, its force and effect on the interest in and title to the property is specifically conditioned on the Plaintiffs' compliance not with the October 9, 1968 contract as made by the parties but with said contract as modified by the September 27, 1972 judgment.

Neither the Order Granting Writ Of Assistance (A.) nor the Writ itself (A.), both entered by the trial court on October 31, 1973, contained any finding or order that either of the specified conditions had been met.

On the contrary, the Order Granting Writ, at its page 4, lines 13-29 (A.), ordered Minnesota Title to effectuate the closing of the escrow and the transfer of the legal title to the plaintiffs subject to compliance by the plaintiffs with the contract and escrow instructions as modified by the September 27, 1972 judgment and as further modified by the Order.

Likewise, the Writ Of Assistance itself, at its page 2, line 16 (A.), to page 3, line 10, commanded Minnesota Title to obtain the escrow file from Transamerica and to proceed with the closing of the escrow in accordance with the contract and escrow instructions as modified by the judgment and the Order; and commanded the Sheriff, upon compliance by the plaintiffs

with the terms of the contract and escrow instructions as modified by the judgment and Order to enter upon the land, eject and remove therefrom all persons holding or detaining the land against the purchaser (the plaintiffs), and deliver possession to said purchaser or their assigns, and maintain, keep and defend their possession according to the tenor and true intent of the judgment and Order.

Accordingly, it was not until entry of the Order of September 30, 1974, that the trial court declared at page 2, lines 24-32 of such Order (A.), that the second condition, the compliance by plaintiff with the contract and escrow instructions as modified by the judgment and Order of October 31, 1973 had been met. The Order of September 30, 1974 made no finding or declaration at all that the first condition had been met.

LACK OF FRIVOLITY

Referring to appellant's contention that the judgment of September 27, 1972 was merely a conditional judgment, appellees state in their Motion:

> It is obvious that this argument would have to have been raised on the previous appeal. Should the rule be otherwise, there would be no end to attempts by unsuccessful litigants to find error in stale judgments against them.

There are two reasons why appellees' claim is without merit. First, that the judgment is conditional is perfectly clear on its face, and it is well settled that an appellate court always examines the finality,

and thus the appealability, of a judgment or order brought before it, regardless of whether it is called to their attention by the parties. Second, on September 13, 1973, F. M. Cocke in his Reply to plaintiff Buyer's Motion To Refer File called the Court's attention to the Conditional judgment Entered On September 27, 1972, and quoted the first condition, as discussed below at pages 6, 7 [ ].

SANCTIONS

In the instant case, contrary to appellees' contentions, appellant does have legal agrievement and not mere disappointment. Appellant's counsel believes that appellant's cause is just, and that the legal issues involved in this case are worthy of consideration by this Court.

For example, the judgment of September 27, 1972 at its page 8, line 14 (A.), states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.
>
> (emphasis added)

The judgment here plainly established on its face (1) that there was only a single four-party agreement entered into on October 9, 1968, and (2) that the judgment modified or rewrote such agreement so as to extend the time for compliance by the Plaintiff Buyers from March of 1969 to

November of 1973, and so in effect to delete the cancellation provisions from the agreement.

The AGREEMENT and the Escrow Agreement No. 02013111-7 (A.) entered into by the parties on October 9, 1968, were consolidated into one four-party agreement by a provision in each. It plainly included the fine print instructions, which included the cancellation provisions. But if the judgment held that the preliminary AGREEMENT was a separate and independent contract for sale and purchase of the land, then it also held that such contract was unenforceable, because it does not mention any installments, nor does it even mention the price of the land.

Appellees appear to complain that the matters involved in this appeal are the same as the matters brought before the Court in Cocke v. Transamerica. But Appellees overlook the fact that at no time in the past have the four parties to the four-party agreement been made parties to an appeal to this Court. It has long been settled that each of the parties to a multiparty contract must be named in an action to adjudicate their mutual rights and obligations under the contract, as in this case. It has also been settled that a multiparty contract containing mutual covenants on behalf of each party, such as the escrow agreement, cannot be specifically enforced by one party thereto against only one other party thereto, since that would require rewriting the contract. 81 CJS, Specific Performance, Sections 1, 26, 158; 49 Am Jur, Specific Performance, Sections 2, 22, 157, 171. It is also well settled that where a contract states grounds upon which a party may rescind or cancel it,

the contract controls as to such grounds. 17 Am Jur 2d, Contracts, Section 495.

As long ago pointed out in Mosher v. Hiner (1945) 62 Ariz. 110, 154 P.2d 372, certiorari denied 325 U.S. 874, 65 S.Ct. 1554, 89 L.ed. 1922, any person interested in the subject matter who has a personal interest in the judgment is a "real party in interest", and unless joined in the action he cannot be bound by the judgment. Each of the four parties in interest was and is indispensable under Rule 19, 16 ARS Rules of Civil Procedure.

Appellees' Motion for sanctions would appear to be without foundation in these circumstances. The case of Tovar v. State is wholly inapplicable.

ADDITIONAL ISSUES INVOLVED IN THE PRESENT APPEAL

I. Whether the judgment entered September 27, 1972 in favor of Buyers Stewart-Horne was and is on its face only a conditional judgment, without force or effect pending judicial determination that the specified conditions have been fulfilled.

A ruling case on conditional judgments is Federal Land Bank of Louisville, Ky., v. Roney (7th Cir., 1944), 139 F.2d 175, 177, cert. den. Roney v. Federal Land Bank of Louisville, Kentucky, 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583, rehearing denied 65 S.Ct. 29, 323 U.S. 810, 89 L.Ed. 645. The court held, citing Corpus Juris:

> * * *"A judgment which will not become effective unless certain conditions are complied with, or which

> may be defeated or attended by performance of a condition subsequent, is no bar to a second action on the same subject matter unless it has become absolute by a performance of the conditions in the one case, or failure to perform in the other* * *."* * *.
>
> (emphasis added)

See also 50 C.J.S. Judgments, Section 621, Conditional Judgment, to the same effect.

The Judgment of September 27, 1972 in favor of Buyers Stewart-Horne, beginning at its page 8, line 14 (A.), states:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his

> interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the plaintiffs' compliance with the terms of said contract as modified hereby.
>
> (emphasis added)

There were two conditions plainly specified here. The first was that F. M. Cocke was ordered to perform the obligations necessary to convey the property in accordance with the escrow agreement as made by the parties upon compliance by Plaintiff Buyers with the terms of said agreement (which included the cancellation provisions).

The second condition was that should F. M. Cocke not perform as ordered, upon compliance with all necessary conditions by Plaintiffs (again including the cancellation provisions), the judgment was to divest F. M. Cocke of his interest in and title to the subject property, said title to be vested in Plaintiff Buyers, subject to the Plaintiff's compliance with the terms of the escrow agreement as modified by the judgment.

The first condition was compliance by the Buyers with the terms of the escrow agreement as made by the parties. The second condition is compliance by the Buyers with the escrow agreement as modified by the judgment. But such modification under longstanding and universal rule is not within the province or power or jurisdiction of a court, and this second condition is not subject to fulfillment at all.

The Buyers do not dispute, nor could they, that the judgment was on its face merely a conditional, not a final or effective, judgment. As a matter of fact, it was after it was admitted that the September 27, 1972 judgment was a conditional judgment that Buyers set about securing the Order of September 30, 1974, in an attempt to make the judgment effective.

Contrary to the statement made in appellees' Motions, the issue of the conditional judgment was earlier raised in the Court of Appeals, but was apparently not ruled on. The Application For Write (A. was filed by Buyers Stewart-Horne in the trial court on September 7, 1973, at which time jurisdiction remained in the Court of Appeals. On September 10, 1973 Buyers filed in the Court of Appeals their Motion To Refer File back to the trial court. On September 13, 1973 F. M. Cocke filed in the Court of Appeals his Reply to the Motion To Refer File, and on October 2, 1973 the Court denied Buyers' Motion. To avoid unnecesarey repetition, F. M. Cocke's Reply of September 13, 1973, is by this reference made a part hereof for all purposes. The attention of the Court is in particular called to Paragraph 3 on page 9 of such Reply, entitled THE CONDITIONAL JUDGMENT ENTERED ON SEPTEMBER 27, 1972.

Copies of Buyers' Application For Writ, with all of its exhibits, and of the trial court's Order To Show Cause addressed to Transamerica (despite the fact that it was never joined in Buyers' action for specific performance of the escrow agreement as made by the parties) were attached to F. M. Cocke's Reply of September 13, 1973, and were thus also placed before the Court of Appeals at that time.

II. A second issue not yet ruled on is whether the Writ Of Assistance issued by the trial court on October 31, 1973 and directed to Minnesota Title and to the Sheriff of Maricopa County to enforce the escrow agreement "as modified", was void because issued without a final and effective judgment to support it, as well as because based on a trial court hearing held when jurisdiction of the case was still in the appellate court.

The Writ Of Assistance (A.) incorporated as exhibits attached thereto the Judgment of September 27, 1972, and the Order Granting Writ entered October 31, 1973. Minnesota Title as a court-appointed corporate officer of the court purportedly acted as directed by this three-document process, without regard to Article 7, Section 15, of the Arizona Constitution which specifies that every person appointed to any office of trust or profit under the authority of the state shall be a qualified elector.

The Sheriff, however, after noting the condition precedent to any positive action repeatedly set forth in the process (the compliance by the Buyers with the agreement as modified by the Judgment or the Order or both) refused to take possession of the land from F. M. Cocke. The process plainly did not meet the requirement of ARS Section 11-447. This statute specifies that a sheriff or other ministerial officer is justified in the execution of and shall execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued. The controlling decision noted under 11-447, Schuster v. Merrill

(1940) 56 Ariz. 114, 106 P.2d 192, held that:

> * * *and process was "regular on its face" when it proceeded from a court, officer, or body having authority of law to issue process of that nature, and which was legal in form and contained nothing to notify or fairly apprise any one that it was issued without authority.
>
> (emphasis added)

The process stated repeatedly that a contract was being modified by a court. The universal rule as to such modification was succintly stated in Goodman v. Newzona (1967) 101 Ariz. 470, 421 P.2d 318:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.* * *
>
> It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh.

As pointed out in 33 CJS, Executions, Sections 5, 6, 15, at page 136:

> Except as it may be otherwise provided by statute, an execution cannot be lawfully issued on other than a final judgment or decree pronounced by a competent court which has determined the respective rights and liabilities of the parties litigant, and an execution issued without a judgment or decree to support it is void and confers no authority on the officer to whom it is directed.* * * A judgment rendered after the issuance of the execution will not have a retrospective effect so as to validate the execution. * * *

At page 137:

> * * *where two or more plaintiffs in separate actions obtain separate judgments against the same defendant, an execution should not be issued as if on a joint judgment, but an execution should be issued on each judgment; * * *
>
> * * *an execution cannot issue on a decree which leaves with the clerk for settlement a question not within his jurisdiction. * * *

At page 138:

> It is essential that the judgment, to be a sufficient basis for a valid execution, be not a mere interlocutory order, or dependent on a mere contingency, but it must be a final determination of the contention between the parties; and must dispose of all the parties; * * *

At page 150:

> Since the execution must pursue and conform to the judgment, it follows that it* * *cannot be issued against one not a party even though he is interested in the judgment, or in fact the real party in interest in the suit. * * *

Transamerica, never joined in Buyers' suit for specific performance of the contract and escrow instructions, could not be bound by the judgment of September 27, 1972 in favor of Buyers. Minnesota Title, substituted by the Order Granting Writ (A.) for Transamerica with all of Transamerica's rights, privileges and duties, could likewise not be bound by the judgment, and could therefore not be bound by the three-document process.

III. Other issues not yet ruled on are (1) whether the trial court's Order of September 30, 1974, ruled that Buyers Stewart-Horne had ever complied with the escrow agreement as made by the parties; (2) whether the trial court had jurisdiction to rule in such Order that Buyers had complied the agreement "as modified" by the trial court; (3) whether such Order of September 30, 1974, cured the conditional judgment of September 27, 1972, and (4) whether such Order validated the Order Granting Writ and the Writ under which Minnesota Title purportedly acted but under which the Sheriff refused to take possession of the land from F. M. Cocke.

It is a well-settled principle that a judgment which specifically conditions its force and effect on the performance or non-performance of certain acts to be done in the future by the parties, as did the judgment of September 27, 1972, remains without

force or effect unless and until the conditions are fulfilled. See Words and Phrases, "Conditional Judgment". This was recognized in the Arizona case Reed v. Frey (1969) 10 Ariz. App. 292, 458 P.2d 386, in which the court pointed out that the doctrine of res judicata applied only to final judgments (not conditional judgments). In Burney v. Lee (1941) 57 Ariz. 41, 110 P.2d 554, the court followed the long-standing rule that a writ of assistance issues only where the ownership or right to possession has been fully determined, as by a final, not a conditional judgment or decree.

Where, as in this instant case, a writ of assistance was issued without final and effective judgment to support it, the question of the validity of the writ was examined and decided in Jackson v. Sears, Roebuck & Co. (1957) 83 Ariz. 20, 315 P.2d 871. In that case the court held that an execution issued without a judgment to support it is void, and no authority is conferred upon the officer to whom such execution is delivered, and that even if a valid and effective judgment is subsequently obtained, it will not have a retroactive effect so as to validate the execution. See also 33 CJA, Executions, quoted hereinabove at page 10 [ ].

Thus, the Order Granting Writ and the Writ under which Minnesota Title purportedly acted were not validated by the Order of September 30, 1974, and were and are void, under the principles pointed to in Jackson v. Sears as well as because of the modification of the agreement.

IV. Whether the trial court had jurisdiction over the subject matter in

entering the three separate judgments against F. M. Cocke and in favor of each of the three other principal parties to the four-party escrow agreement, and whether such judgments were and are therefore void.

Each of these three judgments granted, as sought, the relief of alteration of the agreement. Each of such judgments was entered in the absence of the other two parties, indispensable in a proper determination of their mutual rights and obligations under the single agreement entered into. And each of such judgments was entered without findings to support such judgment as required by due process of law, and therefore was entered without power and authority in the court.

In Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945, 32 L.Ed.2d 332, the court said at 156:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to enforce such judgment or decree. (Citations omitted.)

In Terrell v. Allison, 21 Wall. 289, 22 L.ed 634, the court pointed to the rule that a writ of assistance can only issue

against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree. See also Mosher v. Hiner, supra page 5 [ ].

As restated in the words of Rule 12(b), it is clear that if a court is without the power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter. Failure to join a party indispensable under Rule 19 would have the same effect. Rules 12(b)6, 1 & 7; 12(i)2 & 3; 16 ARS Rules of Civil Procedure.

V. Whether the doctrine of res judicata applies only to valid and final judgments, not void or conditional judgments.

In Earle v. McVeigh (1876) 91 U.S. 503, 23 L.ed 398, the court said at U.S. 507:

> * * *Standard authorities lay down the rule, that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. Borden v. Fitch, 15 Johns. 141.
>
> (emphasis added)

In Reed v. Frey (1969) 10 Ariz. App. 292, 458 P.2d 386, the court pointed out that

the doctrine of res judicata applies only to final judgments (not conditional judgments).

In Brecht v. Hammons (1929) 35 Ariz. 383, 278 P. 381, 382, the court said:

> Three things must concur or a judgment is void upon its face, and may be attacked at any time. The court must have (a) jurisdiction of the subject-matter of the case, (b) jurisdiction of the persons involved in the litigation, and (c) jurisdiction to render the particular judgment given.

Words and Phrase, "Void Judgment", includes:

> A "void judgment" is one which shows on face of record the want of jurisdiction in court assuming to render judgment, which want of jurisdiction may be either of the person, or of the subject matter generally, or of the particular question attempted to be decided or relief assumed to be given. * * *
>
> A "void judgment" is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as tresspassers.* * *

In Preston v. Denkins (1963) 94 Ariz.

214, 382 P.2d 686, the Arizona Supreme Court, En Banc, held that:

> The right to challenge a judgment on the ground that it is void for lack of jurisdiction of the parties does not depend upon rules of court or statute.
>
> Court has no discretion to refuse to vacate a judgment void for lack of jurisdiction and must vacate such a judgment.
>
> Order setting aside entire judgment as void does not leave judgment valid as against defendants not properly before court on the motion to vacate.
>
> Brandt v. Brandt (1953) 76 Ariz. 154, 261 P.2d 978, held that the statute of limitation does not bar an attack upon a void judgment, but that it may be attacked anywhere and at any time.

Accordingly, the Motion To Dismiss and for Sanctions should be denied.

Respectfully submitted this 10th day of February, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	NO. 1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation. Appellee.	MOTION TO DISMISS APPEAL AND IMPOSE SANCTIONS Dated: February 13, 1975 Received: February 21, 1975

Appellee, Transamerica Title Insurance Company of Arizona, by and through its undersigned counsel, respectfully moves this court to dismiss the appeal pursuant to Rules 4(a) and 7(d), Rules of the Supreme Court of Arizona, on the grounds that the appeal is on its face, untimely and frivolent in substance as well as form.

Appellee, Transamerica Title Insurance Company of Arizona, further moves pursuant to Section 12-2106 A.R.S. for sanctions against the appellant, Francis M. Cocke, and pursuant to Section 32-263 A.R.S., for sanction against appellant's attorney, L. Alton Riggs, Jr., on the grounds that the appeal was not instituted in good faith, is patently untimely, and frivolous.

This Motion is supported by the attached Memorandum Of Points And Authorities, Certificate of the Clerk of the Superior Court, attached to the Motion To Dismiss filed by James Stewart Co., which certificate is incorporated herein by reference.

DATED this 13th day of February, 1975.

BROWDER & GILLENWATER, P.C.

By /s/ Powell B. Gillenwater
Powell B. Gillenwater

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant seeks to appeal from various judgments entered herein beginning November 10, 1970, through September 30, 1974. The only judgments that involve appellee, Transamerica Title Insurance Company of Arizona, are those itemized in paragraph six of the Notice Of Appeal as follows:

> "6. The Summary Judgments in favor of counter-defendant, Transamerica Title Insurance Company, and against counter-claimant, Francis M. Cocke, entered November 10, 1970, and the Order Modifying said Judgment of November 10, 1970, and Judgment upon Supersedeas and Cost Bonds, entered November 6, 1972."

The Notice Of Appeal was filed herein on November 27, 1974, almost four years after the original judgment and two years after the order modifying the original judgments. Not only is the attempted appeal, as to Transamerica Title Insurance Company, glaringly untimely, it is in fact, the second appeal by appellant from the Judgments set forth above. The Judgment of November 10, 1970, was appealed by Mr. Cocke and affirmed by the Court of Appeals, in Cocke v. Transamerica Title Insurance of Arizona, (1972) (16 Ariz. App. 566, 494 P.2d 756).

The Order modifying the Judgment of November 10, 1970, which was entered on November 6, 1972, was likewise appealed by Mr. Cocke and dismissed by this court as a frivolous appeal on October 2, 1973, the court stating:

> "It is the opinion of the court that the appeal from the Judgment in favor of Transamerica Title Insurance Company is frivolous."

A copy of the court's order as to that appeal is attached hereto and incorporated herein by reference.

One can only conclude that this appeal is not only frivolous, but constitutes continued harassment by the appellant. This court, on the previous appeal, refused to impose sanctions, although it held the appeal to be frivolous and the court is now, once again, burdened with the same frivolous and patently untimely appeal. It is respectfully suggested that the time has come for the imposition of sanctions, not only as to the appellant, but as to appellant's counsel, who has been forewarned that the reargument of final judgments that have been affirmed on appeal, is questionable advocacy. In Cocke v. Transamerica Title Insurance Company of Arizona, 16 Ariz. App. 566, 494 P.2d 756 (1972), the court stated:

> "To argue at this late date that the beneficiaries of the trust still have an interest in disposition of this real property, and therefore are indispensable parties, not only taxes the patience of this court but calls into serious question the advocacy of appellant's counsel."

The same appellant and counsel are now before this court attempting once again to relitigate and reargue the case of Cocke v. Transamerica, supra, coupled with a second attempt to appeal from the judgment entered November 6, 1972, knowing that their first appeal of that judgment has already been determined by this court to be frivolous.

It would unduly lengthen this memorandum to recite to the court the various legal proceedings that Transamerica has been forced to defend, all springing from

the original counter-claim of Mr. Cocke against Transamerica, which was found to groundless in Cocke v. Transamerica, supra. The continuous harassment of Transamerica, both in the state courts and in the Federal courts, is an onerous burden that should not go uncompensated. For the foregoing reasons, it is requested that the court not only dismiss the untimely and frivolous appeal as to Transamerica Title, but that the court enter an Order granting damages in such amount as the court deems appropriate as sanctions against the appellant and appellant's counsel who choose to ignor the lawful order of this court.

Respectfully submitted this 13th day of February, 1975.

BROWDER & GILLENWATER, P.C.

By /s/ Powell B. Gillenwater
Powell B. Gillenwater

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C-222472
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	O-R-D-E-R Filed: October 2, 1973

The motion to dismiss appeal filed by appellee Transamerica Title Insurance Company, its request for assessment of attorney's fees and costs on appeal and the response thereto have been considered by Judges Donofrio, Ogg and Stevens. In addition, the "motion to refer file pertaining to James Stewart, an Arizona corporation, M. Seth Horne and Maurine D.

Horne, his wife, back to Maricopa County Superior Court" and the reply thereto have also been considered. It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous.

IT IS ORDERED granting Transamerica Title Insurance Company of Arizona's motion, and the appeal is hereby dismissed.

IT IS FURTHER ORDERED that it is the opinion of the Court that the appeal is frivolous. Nevertheless, the Court declines to impose sanctions authorized by A.R.S. §12-2106.

IT IS FURTHER ORDERED denying the motion of Stewart and Horne to refer portions of the file back to the Maricopa County Superior Court.

/s/ Francis J. Donofrio
FRANCIS M. DONOFRIO,
Presiding Judge, Department A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant. vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 CERTIFICATE OF THE CLERK OF THE SUPERIOR COURT

I hereby certify that:

1. The amount or character and date of rendition of the Judgments and Orders appealed from are as follows:

a. The Order Approving Account of Court-Appointed Officer and Petition for Approval and Application for Instructions and for Distributions, entered on September 30, 1974;

b. The Writ of Assistance or, Alternatively, Order Requiring Compliance with Judgment Dated September 27, 1972, or Supplemental Bill Enforcing Said Judgment, entered on October 31, 1973;

c. The Order Granting Application for Writ of Assistance, or,

Alternatively, Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing Said Judgment, entered on October 31, 1973;

d. The Second Amended Judgment for Specific Performance and in the amount of $47,004.86 in addition to Specific Performance, entered on September 27, 1972;

e. The Judgment in Favor of Cross-Claimant Francis M. Cocke, entered on November 10, 1970;

f. The Summary Judgment in Favor of Counter-Defendant Transamerica Title Insurance Company and Against Counter-Claimant Francis M. Cocke, entered on November 10, 1970, and the Order Modifying Said Judgment of November 10, 1970, and Judgment on Supersedeas and Cost Bonds, entered on November 6, 1972.

g. Each and every Order merged in any of the above Orders and Judgments with various dates of entry.

2. The Notice of Appeal was filed with the Clerk of the Superior Court on the 27th day of November, 1974, and service thereof appears on said Notice by mailing on the 27th day of November, 1974.

3. A Bond for Cost on Appeal was filed in the amount of $250 on the 27th day of November, 1974.

4. The Bond in the form of a cashier's check was proper.

5. The record in this matter was completed on the 7th day of January, 1975.

6. The names of the attorneys for the respective parties are as follows:

L. Alton Riggs, Jr.
Attorney for Appellant,
Francis M. Cocke

Powell B. Gillenwater
Browder & Gillenwater, P.C.
Attorneys for Appellee,
Transamerica Title Insurance
Company of Arizona

Loretta S. Whitney
Attorney for Appellee,
Joan H. Cocke

George Sorenson, Jr.
Attorney for Dorthy Cocke
Haimovitz and Elizabeth Cocke
Francis

Hubert E. Kelly
Kelly & Corbin, P.C.
Attorneys for Appellees,
James Stewart Co.,
M. Seth Horne,
Maurine D. Horne, and
Title Insurance Company
of Minnesota

Wallace O. Tanner
Tanner, Jarvis, Owens & Hoyt
Attorneys for Appellees,
James Stewart Co.,
M. Seth Horne,
Maurine D. Horne, and
Title Insurance Company
of Minnesota

GIVEN under my hand and the seal of the Superior Court of the State of Arizona in and for the said County this 30th

day of January, 1975.

/s/ Wilson D. Palmer
Clerk of the Court

By /s/ Lupita Alcala
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 ORDER Filed: February 24, 1975

The separate motions of appellees James Stewart Co., M. Seth Horne, and Maurine D. Horne, and of appellee Transamerica Title Insurance Co. of Arizona, to dismiss the appeal, for damages for taking a frivolous appeal, and for sanctions against appellant's attorney were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating. Appellant's untimely response to the Stewart and Horne motion was also considered. No response has been filed to the Transamerica motion.

The motions to dismiss are based on lack of jurisdiction and frivolousness. The Court has before it at this time the complete record on appeal and the motion papers, which as noted are based in part

on the claimed frivolous nature of this appeal. The Court presumes that faced with such a motion, appellant would assert or enumerate all issues which he intends to raise on appeal, in order to demonstrate that his appeal is meritorious rather than frivolous. Furthermore, to be in issue on appeal, an issue would generally have had to be raised in the trial court. Appellant has listed in his late response a number of issues he asserts should be considered on appeal. In view of the nature of these issues, the posture of this case, and the past disposition of such issues, the Court finds that they are either precluded from consideration or frivolous. After reviewing the entire record herein, and particularly the notice of appeal, appellant's response in the trial court to the petition leading to the order of September 30, 1974, that order itself, and the present motion papers, the Court is forced to conclude that there are no issues of any substance raised by the present appeal, and that the present appeal was taken solely for delay, with no sufficient grounds, and is completely frivolous.

The notice of appeal herein recites that the appeal is from eight separate, specified orders or judgments, and from "Each and every order merged in any of the above orders and judgments." This last designation is merely surplusage, as any order merged in an appealed order or judgment would not be separately appealable and would automatically be considered on appeal from the final order or judgment itself.

Of the eight orders and judgments specified as being appealed from, seven have long since become final and are no

longer subject to appeal either because they were final and appealable when entered, and no appeal was timely perfected therefrom (Notice of Appeal items two, three, and five); or because they were previously appealed and either affirmed or the appeals dismissed (Notice of Appeal items four and six). All of these orders and judgments are already final, res judicata, and not subject to the subsequent, collateral attack appellant is attempting here. The attempted appeal from items two through seven therefore confers no jurisdiction on this Court, as all of such matters are patently non-appealable, and knowledge thereof must be imputed to both appellant and his counsel. The Court therefore regards the purported appeal therefrom as taken solely for delay and frivolous and an abuse of the appellate process.

With respect to the order of September 30, 1974 (Notice of Appeal item one), the only issues raised or specified by appellant are either frivolous on their face or relate to the validity of previous orders and judgments, all of which have become final. No issue whatsoever was raised concerning the account itself, the distribution to be made, or any other aspect of the petition, or the resulting order, except for the authority of the substitute escrow agent to act as such, which should have been questioned when it was first appointed as such in October 1973.

Considering the entire history of this case as revealed by the procedure involved in the orders purportedly appealed from herein, the Court is presented with an extensive set of blueprints for studied

delay and harassment of a party's opponents and a stretching, if not an abuse, of the limits of the judicial process, rather than a legitimate attempt to resolve honestly and expeditiously a bona fide dispute. Repeated filings of excessively long motions and memoranda, amendments and supplements thereto, appeals taken repeatedly on almost the last permissible day therefor, and repetitious raising of previously resolved issues or frivolous issues (such as the ineligibility of the substitute corporate escrow agent to serve as such because it was not an "elector") indicate a consistent plan by appellant to delay and harass his opponents and to burden the Courts of this State with protracted and frivolous litigation; and this appeal is but the latest stage in the execution of such plan. Appellant has already been treated very leniently by the Courts, and has escaped the imposition of damages upon the dismissal of one of his previous appeals as frivolous, which very case he now seeks to appeal again. On the basis of all of the foregoing, we do not hesitate to label this appeal frivolous and to take appropriate action to terminate it to the extent that is within the jurisdiction of this Court.

One of the judgments appealed from awarded appellees James Stewart Co. and the Hornes the sum of $47,004.86. One of the orders appealed from awarded appellee Transamerica Title Insurance Co. of Arizona the sum of $10,533.

IT IS ORDERED granting all appellees' motions to dismiss, and dismissing this appeal for lack of jurisdiction as to matters two through six designated as appealed from in the notice of appeal,

and dismissing this appeal on its entirety as frivolous.

IT IS FURTHER ORDERED granting the motion of appellees James Stewart Co., M. Seth Horne, and Maurine D. Horne for damages, and awarding appellees James Stewart Co., M. Seth Horne and Maurine D. Horne the sum of $4,700 for damages for appellant's taking a frivolous appeal, and ordering that said appellees have and recover said sum from appellant, Francis M. Cocke.

IT IS FURTHER ORDERED granting the motion of appellee Transamerica Title Insurance Co. of Arizona for damages, and awarding appellee Transamerica Title Insurance Co. of Arizona the sum of $1,053 as damages for appellant's taking a frivolous appeal, and ordering that said appellee have and recover said sum from appellant, Francis M. Cocke.

IT IS FURTHER ORDERED denying all appellees' motions for disciplinary sanctions against appellant's attorney, as not within the jurisdiction of this Court.

DATED this 24th day of February, 1975.

/s/ William E. Eubank
William E. Eubank
Acting Presiding Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 MARICOPA County Superior Court No. C-222472 RESPONSE TO MOTION TO DISMISS APPEAL AND FOR SANCTIONS OF APPELLEE TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA

Filed: February 25, 1975

Appellant Francis M. Cocke by and through his counsel undersigned respectfully moves the Court to deny the Motion To Dismiss Appeal and For Sanctions of Appellee Transamerica Title Insurance Company of Arizona, received February 21, 1975, on the grounds that the appeal is not untimely or frivolous and that appellant F. M. Cocke and Appellant's attorney L. Alton Riggs, Jr., have instituted this appeal in good faith and upon good grounds, all as more fully set forth in the attached Memorandum Of Points and Authorities.

Respectfully submitted this
25th day of February, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By_____
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

MEMORANDUM OF POINTS AND AUTHORITIES

Attached hereto and made a part hereof for all purposes is a copy of the Memorandum Of Points and Authorities attached to Appellant's Response, filed herein February 10, 1975, to the Motion To Dismiss And For Sanctions of appellees Stewart-Horne and Title Insurance Company of Minnesota.

In addition, appellant calls attention to the simple fact that the summary judgment entered November 10, 1970, in Transamerica's favor was and is void on the face of the record, and therefore void on its face. Brecht v. Hammons (1929) 35 Ariz. 383, 278 P. 381. Such judgment plainly rested on the asserted power of the Court to enforce paragraphs 8, 9 and 10 of the fine print instructions and at the same time to modify, or alter or delete, paragraphs 1, 14, 16, 17, 18, 24, 25 and 43 of the same fine print instructions. The relief assumed to be given was alteration of the escrow agreement. This has no precedent, in controlling cases, in law or equity. Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P2d 318.

Accordingly, the Motion To Dismiss And For Sanctions should be denied.

Respectfully submitted this 25th day of February, 1975.

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

(A copy of the Response to Motion to Dismiss Appeal of Stewart-Horne and Minnesota Title was attached to the foregoing as a part thereof.)

COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FRANCIS M. COCKE, APPELLANT, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, APPELLEES.	1 CA-CIV 2970 Department B MARICOPA COUNTY No. C-222472

Filed: March 10, 1975.

APPELLANT'S OPENING BRIEF

* * * * *

This fundamental right to have the presented facts examined and ruled on was long ago guaranteed by the federal constitution and laws. In Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797 (1936), the court said at L.ed 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function

> involved. That includes the right to introduce evidence and have judicial findings based upon it.

See also United States v. Aluminum Company of America (1941) 2 FRD 224, 231, and cases cited.

As to the federally guaranteed and protected right to the enforcement of the contract and escrow instructions as made by the parties, in the Arizona case Truax v. Corrigan, 257 U.S. 312, 66 L.ed 254, 42 S.Ct. 124, quoting and following Barbier v. Connelly, 113 U.S. 27, 28 L.ed 923, 5 S.Ct. 357, the court said at L.ed 264:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended,* * *that all persons* * * should have like access to the courts of the country for the protection of their persons and property,* * *the prevention and redress of wrongs and the enforcement of contracts;* * *
>
> * * * * *

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 Department B MARICOPA County Superior Court No. C-222472 APPELLANT'S MOTION FOR RE-HEARING ON ORDER ENTERED FEBRUARY 24, 1975 DISMISSING APPEAL AND IMPOSING SANCTIONS

Filed: March 11, 1975

Comes now appellant Francis M. Cocke by counsel undersigned and moves for a re-hearing on this Court's Order of February 24, 1975. The Order granted the motion of appellees James Stewart Company and M. Seth and Maurine D. Horne, and of Title Insurance Company of Minnesota as an officer of the superior court, and also granted the later motion of appellee Transamerica Title Insurance Company of Arizona, to dismiss the appeal and to impose sanctions on the ground that the appeal was completely frivolous.

The appeal was dismissed and the sanctions imposed before appellant's opening brief was filed, the date of the order of

dismissal being two weeks prior to the end of the time allowed for filing of the brief. The opening brief has now been prepared and filed, and the Court has been so provided with perhaps a better and more complete view of appellant's position in this case than was presented by the responses to the two motions to dismiss and for sanctions.

Counsel for appellant is fully aware that this Court feels strongly that the matters involved in this appeal are res judicata. As set forth in the attached memorandum it is appellant's position that the various judgments and orders appealed from were either conditional and therefore not final, or not within the jurisdiction of the Court.

Respectfully submitted this 11th day of March, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

MEMORANDUM OF ISSUES RAISED

At the outset the Court stated in its order of February 24, 1975, that it had considered appellant's untimely response to the Stewart and Horne motion to dismiss and that no response had been filed to the Transamerica motion.

Counsel for Appellant received the Stewart and Horne motion on Monday, February 3, 1975, and filed the response on Monday, February 10, 1975. During this period of time counsel was home sick with influenza from Monday, February 3, 1975, through Thursday, February 7, 1975, but did not request additional time to respond as it was counsel's understanding that a Monday, February 10, 1975, filing would be timely.

The Transamerica motion was mailed to appellant's counsel on February 14, 1975, according to the date on the envelope. However, the correspondence was improperly addressed and did not reach counsel's law office until February 21, 1975. Appellant's response was filed with the Court on February 25, 1975. The Court ruled on February 24, 1975, prior to the filing of the response to Transamerica's motion. This response incorporated the earlier response to appellee Buyers' motion and added the issue of the validity of Transamerica's separate summary judgment.

Appellant's two responses appear to have called the attention of the Court to the basic issues, raised by the claims of res judicata, of the power and jurisdiction of a court to (1) fundamentally modify or alter a valid agreement, (2)

to enter judgment without any findings or conclusions at all on undisputed facts and evidence presented, from which the inferences or conclusions could be reasonably, if not inescapably, drawn that the agreement was repudiated or cancelled under its own terms, before the litigation over it began. Also pointed to was (3) the issue of whether a court had jurisdiction to bind by judgment a party in interest where not joined in the action and (4) the issue of the conditional judgment.

The notice of appeal included timely appeal from the Order entered September 30, 1974. This Order on its face expressly ruled that Buyers' judgment entered September 27, 1972 had modified the agreement of the parties entered into on October 9, 1968, and also ruled that the escrow had been closed in accordance with such agreement as so "modified".

That such modifications included fundamental alterations is also clear. The September 27, 1972 judgment expressly "modified" the agreement of the parties by adding four years and eight months to the 13-day period specified by the agreement for compliance by the Buyers, following the escrow agent's March 6, 1969 notice to them that to avoid cancellation they must comply by March 19, 1969.

Buyers' judgment of September 27, 1972 also plainly ruled that the "contract" entered into on October 9, 1968 constituted a single four-party agreement, which included the provisions for the annual installments on the mortgages, and also included the fine print

instructions on the back of Transamerica's printed escrow form, which contained the cancellation provisions. If the judgment had ruled that the preliminary Agreement entered into on October 9, 1968 was a separate and independent contract, instead of a part of the single four-party agreement, it would have so ruled that it was unenforceable, because it contained no provisions for installments, and did not even mention the price of the land.

Buyers' judgment entered September 27, 1972 on its face in its last paragraph also specifically subjected or conditioned its force and effect on the compliance by the Buyers with the agreement as modified by the judgment. This was done even though in its next to last paragraph the judgment ordered F. M. Cocke to perform all obligations necessary to convey the subject property, upon compliance by the Buyers with the agreement as made by the parties (not as modified).

The obvious issue of whether the Order entered September 30, 1974 ruled that Buyers' judgment of September 27, 1972 was void for want of jurisdiction to modify the agreement, is Question I of the questions presented for review by the opening brief. Whether the September 27, 1972 judgment ruled that only the single four-party agreement was entered into on October 9, 1968, whether such agreement contained the cancellation provisions, whether the judgment fundamentally altered the cancellation provisions, and was a conditional judgment, is Question II of the opening brief.

Each of these issues was pointed to

by appellant's first response, which on its page 6 quoted the last three paragraphs of the September 27, 1972 judgment to prove the points made. The issue of the conditional judgment was discussed at length, and included the issue of whether the point was earlier raised. A controlling case which ruled that a court is without jurisdiction to modify a valid agreement, Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, is a case almost on all fours with this present case, and was quoted in the response.

ISSUES POINTED TO BY THE RESPONSES

The Order dismissing the appeal stated that appellant was expected to list in the responses the issues to be raised by the appeal. However, appellant's first response, beginning at its page 5, lines 4 and 16, stated:

> * * *But Appellees overlook the fact that at no time in the past have the four parties to the four-party agreement been made parties to an appeal to this Court.* * *
>
> It is also well settled that where a contract states grounds upon which a party may rescind or cancel it, the contract controlls as to such grounds.* * *

At page 5, line 32, under the heading Additional Issues Involved In The Present Appeal, the response listed as I the issue of the conditional judgment, and at page 8, line 23, as II the issue of whether

the Writ Of Assistance was void because issued without a final and effective judgment to support it, as well as because based on a hearing in superior court held when jurisdiction of the case was still in the appellate court. Beginning at its page 11, line 1, the response stated:

> III. Other issues not yet ruled on are (1) whether the trial court's Order of September 30, 1974, ruled that Buyers Stewart-Horne had ever complied with the escrow agreement as made by the parties; (2) whether the trial court had jurisdiction to rule in such Order that Buyers had complied with the agreement "as modified" by the trial court; (3) whether such Order of September 30, 1974, cured the conditional judgment of September 27, 1972, and (4) whether such Order validated the Order Granting Writ and the Writ under which Minnesota Title purportedly acted but under which the Sheriff refused to take possession of the land from F. M. Cocke.

Beginning at its page 12, line 10, the response pointed to another jurisdictional question:

> IV. Whether the trial court had jurisdiction over the subject matter in entering the three separate judgments against F. M. COCKE and in favor of each of the three other principal parties to the four-party escrow agreement, and whether such judgments were and are therefore void.

> Each of these three judgments, granted as sought, the relief of alteration of the agreement. Each of such judgments was entered in the absence of the other two parties, indispensable in a proper determination of their mutual rights and obligations under the single agreement entered into. And each of such judgments was entered without findings to support such judgment as required by due process of law, and therefore was entered without power and authority in the court.

And on its page 13, line 13, pointed to the issue of res judicata:

> V. Whether the doctrine of res judicata applies only to valid and final judgments, not void or conditional judgments.

ISSUES AND QUESTIONS
PRESENTED BY THE BRIEF

The issues and questions presented by the opening brief in addition to I and II mentioned above are:

III, the issue of the validity of the summary judgment entered November 10, 1970 in favor of Transamerica (because it altered the agreement).

IV Whether Transamerica's summary judgment entered November 10, 1970, and the summary judgment granted the Buyers by minute order on December 8, 1970 were properly granted, because the facts presented did not as a matter of law lead to only one conclusion, and F. M. Cocke was

entitled to have the matter tried.

V Whether the Writ Of Assistance under which Minnesota Title purportedly closed the escrow was void, and whether deeds executed or delivered by it vested no title in the grantee; and

VI Whether the Buyers' complaint for specific performance of the agreement failed to state a claim upon which relief could be granted.

As noted by Supreme Court Rule 5(b)7, the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. And it is therefore appellant's position that the responses sufficiently listed the issues to be raised on the appeal.

RIGHTS SECURED AND PROTECTED BY THE FEDERAL CONSTITUTION AND LAWS

To establish that the right to findings and conclusions on facts and evidence presented, and as well as the right to enforcement of the contract as made by the parties, are rights secured and protected by the federal constitution and laws, the opening brief at page 43 quotes Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 80 L.Ed. 1209, 56 S.Ct. 797:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

And at page 44 quotes the Arizona case Truax v. Corrigan, 257 U.S. 312, 66 L.Ed. 254, 42 S.Ct. 124:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, * * *that all persons* * *should have like access to the courts of the country for the protection of their persons and property,* * * the prevention and redress of wrongs and the enforcement of contracts;* * *

This constitutional right as a matter of due process to findings and conclusions on facts and evidence presented is the fundamental principle adhered to in Lundy v. Prescott Valley, Inc. (1974) 110 Ariz. 362, 519 P.2d 61, which is quoted at page 40 of the brief:

> * * *The facts presented do not as a matter of law lead to only one conclusion; on the contrary the facts are subject to interpretation which allow for reasonable men to reach different conclusions. Under such circumstances the plaintiff was entitled to have the matter tried and the defendant was not entitled to judgment.
>
> The judgment is reversed, and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

To the same effect are Realty Executives, Inc. v. Willis (1973) 20 Ariz. App. 340, 512 P.2d 872; and Dutch Inns of America, Inc. v. Horizon Corporation (1972) 18 Ariz. App. 116, 500 P.2d 901.

Likewise, the constitutional right to enforcement of the October 9, 1968 agreement as made by the parties is the fundamental principle adhered to in the Goodman v. Newzona Investment Co. case, mentioned above. In that case, which is quoted at page 20 of the brief, the court said:

> * * *It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.
> * * *
>
> (Citations omitted)

In Irvin v. Dowd (1959) 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825, the court pointed out that state courts, equally with federal courts, have the obligation to guard, enforce and protect every right granted or secured by the Federal Constitution. In Lee v. State of Florida (1968) 392 U.S. 378, 20 L.Ed.2d 1166, 88 S.Ct. 2096, the court pointed to Article VI of the United States Constitution, as binding the state courts by the federal laws in the same manner as by the constitutional

provisions. Article VI includes:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;* * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * *and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;* * *

See also 42 U.S.C. Sections 1981-1988; Cooper v. Aaron (1958) 358 U.S. 1, 3 L.Ed. 2d 5, 78 S.Ct. 1401; O'Shea v. Littleton (1974) 38 L.Ed.2d 674, 687, 688, 94 S.Ct. 669.

It is clear, then, that in the fundamental principles laid down by the Lundy, Realty Executives, and Dutch Inns cases as above set forth, and by Goodman v. Newzona, that the appellate courts of Arizona are in harmony with recent as well as earlier land-mark decisions of the U.S. Supreme Court.

And it is equally clear that the superior court, being likewise bound by the federal constitution and laws, was without the power or jurisdiction in this instant case to enter its judgment altering the agreement of the parties, or to cover up by summary judgment, or by the failure to make requested findings and conclusions, the facts and documentary evidence presented. Where the lower court

has entered a judgment not within its jurisdiction, as here, the jurisdiction of the appellate court on review is limited to correcting the error of the lower court. Goodman v. Newzona Investment Co., supra; Lundy v. Prescott Valley, Inc., supra; Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965) 341 F.2d 514; Riley v. County of Cochise (1969) 10 Ariz. App. 55, 455 P.2d 1005.

In Preston v. Denkins (1963) 94 Ariz. 214, 383 P.2d 686, the court held that:

> The right to challenge a judgment on the ground that it is void for lack of jurisdiction of the parties does not depend upon rules of court or statute.
>
> Court has no discretion to refuse to vacate a judgment void for lack of jurisdiction and must vacate such a judgment.
>
> Order setting aside entire judgment as void does not leave judgment valid as against defendants not properly before court on the motion to vacate.

For further discussion of dismissal of appeals see Disposition of Civil Appeals In The Supreme Court--Dismissal. Charles C. Bernstein, 5 Arizona Law Review 175 (1964).

Accordingly, appellant is entitled to full consideration of the issues raised by his appeal, and therefore to a rehearing on the Order of February 24, 1975 dismissing the appeal and imposing sanctions.

Respectfully submitted this
11th day of March, 1975.

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
Attorneys for Appellant
231 North Alma School Road
Mesa, Arizona 85201

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARZIONA, an Arizona corporation, Appellees.	1 CA-CIV 2970 Department B MARICOPA County Superior Court No. C-222472 OBJECTIONS TO MOTION FOR REHEARING Filed: March 13, 1975

COME NOW the Appellees, James Stewart Co., M. Seth Horne, and Maurine D. Horne, pursuant to Rule 47(a) of the Rules of the Court of Appeals and file their objections to the Motion for Rehearing of Appellant, Francis M. Cocke, on the grounds that said Motion for Rehearing contains no new or substantial matters indicating that the Appeal taken by the Appellant was meritorious in any respect, as more fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted this 13th day of March, 1975.

KELLY & CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant's Motion for Rehearing, together with the Memorandum attached thereto, does not in any way support any basis for a reconsideration of this Court's dismissal of the Appeal and imposition of sanctions. Appellant, in his Memorandum of Issues Raised at page 4, lines 2 through 7, stated that the Order of September 30, 1974, from which Appellant allegedly bases his Appeal, "expressly ruled that Buyers' Judgment entered September 27, 1972 had modified the Agreement of the parties entered into on October 9, 1968, and also ruled that the escrow had been closed in accordance with such Agreement as so 'modified'."

Such a statement in itself shows that there is nothing per se in the Order of September 30, 1974 which Appellant is contesting in his Appeal. Instead, Appellant is attempting to use some wording found in this Order as a basis for reopening a Judgment entered some two years beforehand.

The entire substance of Appellant's Memorandum is aimed at the same arguments previously long ago resolved. While Appellant attempts to disguise these attacks through the use of different approaches to those arguments, it is clear that there is nothing of merit to support the Appeal.

The cases cited by the Appellant in his Memorandum add nothing, and are, in

fact, completely inapposite to the issue of whether a valid and meritorious Appeal was taken from the trial court's Order of September 30, 1974.

On the basis of the foregoing, it is respectfully requested that the Court deny Appellant's Motion for Rehearing.

DATED this 13th day of March, 1975.

KELLY & CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
550 West Washington
Phoenix, Arizona 85003
Attorneys for Appellees

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant and Cross-Appellee, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Appellees and Cross-Appellants.	No. 1 CA-CIV 2306 DEPARTMENT A MARICOPA County Superior Court No. C 222472 RESPONSE TO MOTION FOR REHEARING
FRANCIS M. COCKE, Appellant, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellee.	Filed: March 17, 1975

COMES NOW Transamerica Title Insurance Company of Arizona, by and through their undersigned counsel, and respectfully respond to appellant's motion for rehearing as follows:

As is usual, it is difficult to res-

pond to Mr. Cocke's Motion for Rehearing because of its shotgun nature. The motion is typical of other pleadings that have been filed herein which are at best, an attempt to rehash and relitigate matters that have already been determined in the case of Cocke v. Transamerica, 16 Ariz. App. 566, 494 P.2d 756 (1972), or have been previously decided in the first frivolous appeal that was filed by Mr. Cocke in his never ending quest of a cause of action against Transamerica.

A careful reading of the Motion for Rehearing leads to the conclusion that the appellant's request for rehearing is based primarily upon the fact that he has now filed his opening brief and that the judgments that were appealed from are either conditional or were entered without jurisdiction. As to the first contention, it is obvious that the mere filing of an opening brief after a Motion To Dismiss the appeal has been granted, does not in any way, bootstrap the appeal from the frivolous catagory in which it was founded. Secondly, the plain facts are that the judgments in favor of Transamerica which the appellant seeks to appeal, are final and were entered unconditionally, and at a time when the court had jurisdiction over Mr. Cocke, the property involved, and jurisdiction to determine the subject matter of the litigation.

In short, the Motion for Rehearing, is nothing more than another page in the long cronicle of harassment of Transamerica Title by the appellant. It is therefore respectfully submitted that the Motion for Rehearing should be denied and the Motion Dismissing the Appeal and Imposing Sanctions continued in full force and effect.

DATED this 17th day of March, 1975.

BROWDER & GILLENWATER, P.C.

By /s/ Powell B. Gillenwater

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona Corporation, et al., Appellees.	1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 ORDER Filed: March 20, 1975

Appellant's motion for rehearing of this Court's order of February 24, 1975, dismissing this appeal as frivolous and for lack of jurisdiction, and the responses thereto, were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating.

IT IS ORDERED denying the motion for rehearing.

DATED this 19th day of March, 1975.

By /s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

April 1, 1975

Filed: April 1, 1975

Mr. Clifford H. Ward, Clerk
Arizona Supreme Court
1700 West Washington Street
Second Floor, West Wing
Phoenix, Arizona 85007

Dear Mr. Ward:

RE: 1 CA-CIV 2970

MARICOPA C-222472

COCKE vs. JAMES STEWART
COMPANY, et al.

The appeal of this cause was dismissed by order of the Court on the 24th day of February, 1975.

The motion for rehearing was denied on the 20th day of March, 1975.

A timely petition for review was filed by this Court on the 31st day of March, 1975. Pursuant to the mandate contained in Supreme Court Rule 47(b), the record is hereby transmitted to your Court, as follows:

1. PETITION FOR REVIEW (7);
2. ORDER DENYING MOTION FOR RE-HEARING (6);
3. OBJECTIONS TO MOTION FOR RE-HEARING (6);
4. APPELLANT'S MOTION FOR REHEAR-ING ON ORDER ENTERED FEBRUARY

27, 1975 DISMISSING APPEAL AND IMPOSING SANCTIONS (6);
5. ORDER DISMISSING APPEAL (6);
6. ABSTRACT OF RECORD ON APPEAL (1-17 vols.) (originals);
7. APPELLANT'S OPENING BRIEF (orig, Sets 1 & 2);
8. Documents filed in the Court of Appeals, Division One (clipboard);
9. Instruments (4 parts);
10. Minute Entries;
11. Depositions (2 vols.) (ARLEIGH R. BURTON and M. SETH HORNE);
12. Exhibits (contained in one manila envelope and folder).

The copies of the abstract of record on appeal have been retained by the Court of Appeals, Division One, and are available upon request.

In the event the Supreme Court accepts the review, we will endeavor to secure and forward the remaining sets of abstracts of record and briefs.

Very truly yours,

CLASSIE GANTT, Clerk

By /s/ C. Walters
Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	12058 PR 1 CA-CIV 2970 DEPARTMENT B MARICOPA County Superior Court No. C-222472 MOTION TO REMAND PETITION FOR REVIEW TO COURT OF APPEALS FOR PERMISSION TO ENLARGE THE RECORD AND TO FILE A PETITION FOR REHEARING

Filed:
April 21, 1975

COMES NOW appellant, Francis M. Cocke, by and through his attorneys undersigned and respectfully requests that this Court remand the petition for review now before this Court to the Court of Appeals for permission to enlarge the record to include depositions taken in the case but not now included in the record and for permission to file a petition for rehearing before the Court of Appeals for the reasons set forth in the Memorandum attached hereto and incorporated by reference herein.

Respectfully submitted this
21st day of April, 1975

SMITH, RIGGS, BUCKLEY, RIGGS
& FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
231 North Alma School Road
Mesa, Arizona 85201
Attorneys for Appellant

MEMORANDUM

Appellant's petition for review is now before this Court. Subsequent to the time appellant filed his petition for review with the Court of Appeals, that Court on April 1, 1975, directed a transmittal letter to Mr. Clifford H. Ward, Clerk of the Arizona Supreme Court pursuant to the mandate contained in the Supreme Court Rule 47 (b).

The letter set forth those items of the record transmitted to the Supreme Court.

Item 11 thereof specified that two depositions were transmitted, those of Arleigh R. Burton and M. Seth Horne.

Other depositions had been taken in the case and had been sent to the Superior Court of Maricopa County. These depositions should have been transferred to the Court of Appeals pursuant to appellant's designation of the record. However, it appears they were not.

The letter of April 1, 1975, was appellant's first notice that the other depositions were not contained in the record.

A close check with the Clerk of the Superior Court and the Clerk of the Court

of Appeals revealed the fact that the depositions were no where to be found and in fact the Superior Court had no record of receiving the depositions. However, copies of the depositions indicate that the originals were sent to the Superior Court.

Three of the depositions were prepared by Verona M. Polson & Associates, Court Reporting Services. These were the depositions of Henry Kavanuagh, Escrow Officer of Transamerica Title Insurance Company, taken February 27, 1970, at 10:10 o'clock, A.M., the deposition of Owen L. Wagoner, of Transamerica's Title Plant, taken February 27, 1970, at 11:45 o'clock A.M., and the deposition of Myron Howard, House Counsel for Transamerica, taken May 8, 1970, at 10:40 o'clock A.M.

Attached hereto and incorporated by reference herein is a statement from Marla F. Graham, daughter of Verona M. Polson and the new owner of Court Reporting Services attesting to the fact that the copies of the depositions of Henry Kavanuagh, Owen L. Wagoner and Myron Howard filed herein with these pleadings are true copies of the originals of same depositions excluding any handwriting on same.

Appellant's previous briefs referred to some of the material in these depositions. It is appellant's position that if said depositions had properly been in the record transmitted to the Court of Appeals that that Court may have ruled differently.

In addition there were two other depositions taken. One of Lorne McCarthy of Brown Engineering Co. Inc. and the

other of Francis M. Cocke. These latter two depositions it now appears were not filed with the Superior Court of Maricopa County.

Accordingly it is appellant's position that inasmuch as the full record was not before the Court of Appeals, that it would be proper at this time for the record before that Court to be enlarged so as to add the depositions and that it would be only proper that the appellant be allowed to file a motion for rehearing based on the enlarged record before that Court.

Respectfully requested,

SMITH, RIGGS, BUCKLEY,
RIGGS & FULLER

By/s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
231 North Alma School
Road
Mesa, Arizona 85201
Attorneys for Appellant

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	))12058 PR)1 CA-CIV 2970)DEPARTMENT B))MARICOPA County)Superior Court)No. C 222472))MEMORANDUM IN)OPPOSITION TO)MOTION TO REMAND)PETITION FOR RE-)VIEW TO COURT OF)APPEALS FOR)PERMISSION TO EN-)LARGE THE RECORD)AND TO FILE A)PETITION FOR)REHEARING)

Filed:
April 25, 1975

PRELIMINARY STATEMENT

This is a memorandum in opposition to appellant's motion to remand the petition for review to the Court of Appeals in order to enlarge the record at that level and to file a petition for rehearing. Appellant's motion was filed with the Court on or about April 21, 1975. In the memorandum attached to the motion it is set forth that certain depositions, which should have been included in the record on appeal, were not transmitted to the Court of Appeals by the Clerk of the Superior Court of Maricopa County. It is

appellant's position that if the depositions had been forwarded to the Court of Appeals that Court may have ruled differently than it did in the order issued by it February 24, 1975.

STATEMENT OF CASE

The chronological sequence of events necessary for consideration of the instant motion are as follows:

November 27, 1974--Notice of Appeal from eight orders and judgments filed by appellant.

January 30, 1975--Motion to Dismiss Appeal and impose sanctions filed by appellees Horne and Title Insurance Company of Minnesota.

February 24, 1975--Order of Division One of the Court of Appeals dismissing Appellant's appeal and imposing sanctions against the appellant Cocke.

March 11, 1975--Motion for Rehearing filed by appellant.

March 19, 1975--Order of Division One of the Court of Appeals denying appellant's motion for rehearing.

March 31, 1975--Appellant's Petition for Review by the Supreme Court of Arizona.

April 21, 1975--Appellant's Motion to Remand Petition for Review to Court of Appeals for Permission to Enlarge the Record and to File a Petition for Rehearing.

ARGUMENT

I APPELLANT'S MOTION IS NOT A PROPER MOTION

Appellees oppose the instant motion because it is not a proper motion. There is no provision for such a motion under the Rules of the Supreme Court of Arizona. Rule 47(a) provides that a party desiring a rehearing from a final order or decision of the Court of Appeals, except an order denying a motion for rehearing, may within fifteen days of such order or decision file a motion for rehearing. Quite clearly Rule 47(a) prohibits the filing of a motion for rehearing once such a motion has been filed and acted upon by the Court of Appeals.

Appellant filed a Motion for Rehearing on March 11, 1975, which was denied on March 19, 1975. To remand the case to the Court of Appeals at this point would allow appellant to file a second motion for rehearing in contradiction to Rule 47 (a).

Moreover, the motion is deficient in that there is absolutely no showing by appellant wherein the depositions which he claims to have been omitted from the record are material to the decision rendered by the Court of Appeals. True, the depositions may have been material to a substantive determination of the case. However, the Court of Appeals dismissal of appellant's appeal was based upon the fact that seven of the eight orders and judgments appealed from were "final, res judicata, and not subject to the subsequent, collateral attack" by appellant. As to the remaining order appealed from, the Court of Appeals quite properly pointed

out that no issue had been raised concerning that order which involved the account of the court appointed officer and the distribution which was to be made. Therefore, the Court of Appeals dismissed the case because appellant's appeal was untimely and frivolous.

II APPELLANT'S MOTION DOES NOT COMPLY WITH RULE 75(h), ARIZONA RULES OF CIVIL PROCEDURE

Obviously, the rules of the Court should be followed to the fullest extent. To this end appellees recognize that it might be possible to consider appellant's motion as "a proper suggestion" to correct the record within the meaning of Rule 75 (h), Arizona Rules of Civil Procedure. However, before that rule comes into play, the materality of the omitted material must be established. This appellant has failed to do.

Moreover, Rule 75(h) should not be invoked where the end result is to deny the appellees a substantive right. In this instance the appellees maintain that they have established their rights in the court below. Once before they have been put to the burden of pursuing an appeal in this case. Herein again they are being put to that burden; defending an appeal which they contend to be spurious, unmeritorous, frivolous and designed to harass and harangue them. Therefore, to allow appellant's motion to be considered under Rule 75(h) would in their opinion deny appellees a substantive right. Smith v. Wade, 245 Pac. 353 (1926); see also Rodriquez v. Williams, 451 P2d 609 (1969).

Moreover, it is the duty of the

Appellate Court to "interpret all parts of the record together, giving effect, if possible, to all and a deficiency in one place may be supplied by what appears in another," State v. Rockerfeller, 451 P2d 623 (1969). Therefore, assuming the materiality of the depositions in question, appellant has not shown if that defect in fact is corrected in some other part of the record.

In addition, appellant contends that if the depositions had been in the record transmitted, the Court of Appeals may have ruled differently. Inasmuch as the order of February 24, 1975 dismissing appellant's appeal was based on the grounds of frivolousness, it escapes appellees how the Court might have ruled differently if the depositions had been transmitted to it.

III APPLICATION OF RULE 4(e)

Rule 4(e) of the Rules of the Supreme Court provides that any motion not specifically provided for, if denied, will on the Court's motion subject the moving parties and their attorney to the assessment of costs and attorneys fees in an amount to be fixed by the Court in favor of the opposing parties. Appellees respectfully submit that appellant and his counsel have filed a motion not provided by the Court's rules. Appellant and his counsel have again taken a shot gun approach to perpetuate the delay in ending this litigation and to continue to harass appellees and burden the Court of this state with spurious and frivolous litigation. Accordingly, appellees maintain that the Supreme Court may in its discretion invoke the application of

Rule 4(e) to appellant's motion.

For the foregoing reasons, appellees maintain that appellant's motion should be denied.

DATED this 25th day of April, 1975.

Respectfully submitted,

By /s/ Roger K. Gilbert
Roger K. Gilbert for
Hubert E. Kelly
Attorney for Appellees
550 W. Washington
Phoenix, AZ

SUPREME COURT
STATE OF ARIZONA

April 30, 1975
Filed:
April 30, 1975

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona Corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Appellees.	Supreme Court No. 12048-PR Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472

The following action was taken by the Supreme Court of the State of Arizona on April 29, 1975 in regard to the above entitled cause:

"ORDERED: Motion to Remand Petition for Review to Court of Appeals for Permission to Enlarge the Record and to file a Petition for Rehearing = Granted."

Record returned to the Court of Appeals, Division One, including 3 volumes of depositions (Henry Kavanaugh, Owen L. Wagoner, and Myron Howard).

A copy of the Motion to Remand Petition for Review to Court of Appeals for Permission to Enlarge the Record and to File a Petition for Rehearing attached hereto.

CLIFFORD H. WARD, Clerk

By /s/ Mary Hopkins
Deputy Clerk

THE COURT OF APPEALS
STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman, and TRANSAMERICA TITLE INSURANCE COMPANY OF ARZIONA, an Arizona corporation, Appellees.	Supreme Court No. 12058-PR Court of Appeals No. 1 CA-CIV 2970 Maricopa County Superior Court No. C-222472 MOTION FOR PERMISSION TO ENLARGE THE RECORD AND PETITION FOR REHEARING Filed: May 9, 1975

COMES NOW Appellant, Francis M. Cocke by and through his attorneys undersigned and pursuant to the Order of the Supreme Court of the State of Arizona dated April 29, 1975, respectfully requests that this Court enlarge the record to include depositions taken in the case but not included in the record, and respectfully moves for a rehearing on this Court's Order of February 24, 1975, for the reasons set forth in the Memorandum attached hereto and incorporated by reference herein.

Respectfully submitted this 9th day of May, 1975.

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.
L. Alton Riggs, Jr.
231 North Alma School Road
Mesa, Arizona 85201
Attorneys for Appellant

MEMORANDUM

Now deposited with the Court of Appeals, Division 1, are three volumes of depositions, which volumes were not included in the record before this Court earlier received from the Maricopa County Superior Court. Accordingly these depositions were not before the Court at the time of the Court's Order on February 24, 1975, and perhaps at the times of its earlier decisions.

Appellant only discovered the absence of these depositions subsequent to the time that appellant filed his petition for review with the Court of Appeals, when this Court directed a transmittal letter to Mr. Clifford H. Ward, Clerk of the Arizona Supreme Court pursuant to Supreme Court Rule 47 (b).

The letter set forth those items of record transmitted to the Supreme Court, and item 11 thereof specified that only two depositions were transmitted, those of Arleigh R. Burton and M. Seth Horne.

Three other depositions had been taken in the case and had been sent to the Superior Court of Maricopa County. These depositions should have been transferred to the Court of Appeals pursuant to Appellant's designation of the record. However, it appears they were not.

A close check with the Clerk of the Superior Court and the Clerk of the Court

of Appeals revealed the fact that the depositions were nowhere to be found, and in fact the Superior Court now has found no record of receiving the depositions. However, copies of the depositions indicate that the originals were filed with the Superior Court. The three depositions were prepared by Verona M. Polson and Associates, Court Reporting Services. These were the depositions of Henry Kavanuagh, Escrow Officer of Transamerica Title Insurance Company, taken February 27, 1970, at 10:00 o'clock A.M., the deposition of Owen L. Wagoner, of Transamerica's Title Plant, taken February 27, 1970, at 11:45 o'clock A.M., and the deposition of Myron Howard, House Counsel for Transamerica, taken May 8, 1970, at 10:40 o'clock A.M.

Marla F. Graham, daughter of Verona M. Polson and new owner of Court Reporting Services has attested to the fact that the copies of the depositions of Henry Kavanuagh, Owen L. Wagoner and Myron Howard, now transferred to this Court, are true copies of the originals of the depositions excluding any handwriting on the depositions. A copy of her attestation was filed with the Supreme Court.

Appellant's previous briefs have referred to some of the material in these three depositions, and it is Appellant's position that if said depositions had properly been in the record transmitted to the Court of Appeals this Court may have ruled differently.

Accordingly it appears that it would be proper at this time for the record before this Court to be enlarged so as to include the depositions, and inasmuch as

the full record was not before the Court at the time of its Order on February 24, 1975, Appellant respectfully requests a rehearing based on the more complete record.

In the case of Lindus v. Northern Insurance Company of New York, 103 Ariz. 160, 438 P. 2d 311, at page 313 the Court stated:

> "We believe, however, that the proper criterion to be considered in determining whether to recall a mandate was succinctly expressed by the Supreme Court of the United States in United States v. Ohio Power Co., 353 U.S. 98, 99, 77 S.Ct. 652, 653, 1 L.Ed.2d 683, where it is stated:
>
> '* * * the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.'

Faced with the same problem that we now have before us the United States Supreme Court in Gondeck v. Pan American World Airways, Inc., 382 U.S. 25, 86 S.Ct. 153, 15 L.Ed.2d 21, in order to prevent injustice, granted a second petition for rehearing three years after the mandate had issued. See also Cahill v. New York, N. H. & H. R. Co., 351 U.S. 183, 76 S.Ct. 758, 100 L.Ed. 1075; Chapman v. St. Stephens Protestant Episcopal Church, 105 Fla. 683, 136 So. 238, 138 So. 630, 139 So. 188, 145 So. 757, 84 A.L.R. 566.

A decision to recall a mandate must

> of necessity include a balancing of competing interests. Where the interests of justice outweigh the interest in bringing litigation to an end the court should recall the mandate. Of course where there has been either fraud, imposition, or mistake of fact, the court can always recall a mandate to modify or correct its own judgment. Overson v. Martin, 90 Ariz. 151, 367 P.2d 203."

In addition to the three depositions above mentioned, there were two other depositions taken in this case. One of Lorne McCarthy of Brown Engineering Co., Inc. and the other of Francis M. Cocke. It now appears that these later two depositions were not filed with the Superior Court of Maricopa County. However, if the Court so desires, these two depositions could also be made a part of the record.

Respectfully submitted,

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By /s/ L. Alton Riggs, Jr.

L. Alton Riggs, Jr.
231 North Alma School Road
Mesa, Arizona 85201
Attorneys for Appellant

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona Corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN A COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Appellees.	)	1 CA-CIV 2970 DEPARTMENT B MARICOPA Co. Superior Court No. C-222472 ORDER Filed: May 16, 1975

Pursuant to the order of the Supreme Court of the State of Arizona dated April 29, 1975, appellant's motion for permission to enlarge the record and petition for rehearing were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating.

IT IS HEREBY ORDERED granting appellant's motion to enlarge the record.

IT IS FURTHER ORDERED denying appellant's petition for rehearing.

DATED this 16th day of May, 1975.

By /s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

May 22, 1975
Filed:
May 22, 1975

Mr. Clifford H. Ward, Clerk
Arizona Supreme Court
1700 West Washington Street
Second Floor, West Wing
Phoenix, Arizona 85007

Dear Mr. Ward:

RE: 1 CA-CIV 2970

MARICOPA C-222472

SUPREME COURT NO.
12058-PR

COCKE vs. JAMES
STEWART COMPANY, et al.

The appeal of this cause was dismissed by order of the Court on the 24th day of February, 1975. Thereafter, a petition for review was filed on March 31, 1975.

Thereafter, and on the 21st day of April, 1975, the Arizona Supreme Court remanded this appeal to the Court of Appeals, Division One, for a limited purpose "SUPREME COURT NO. 12058-PR".

On May 16, 1975 the Court of Appeals, Division One, granted the appellant's motion to enlarge the record, and denied appellant's petition for rehearing.

A timely petition for review was filed in this Court on the 21st day of May, 1975. Pursuant to the mandate contained in Supreme Court Rule 47 (b), the record is hereby transmitted to your Court, as follows:

1. ORDER (filed May 16, 1975) (6);
2. MOTION FOR PERMISSION TO ENLARGE THE RECORD AND PETITION FOR REHEARING (6);
3. PETITION FOR REVIEW (7);
4. ORDER denying motion for rehearing (orig);
5. OBJECTIONS TO MOTION FOR RE-HEARING (orig);
6. APPELLANT'S MOTION FOR REHEARING ON ORDER ENTERED FEBRUARY 24, 1975 DISMISSING APPEAL AND IMPOSING SANCTIONS (orig);
7. ORDER DISMISSING APPEAL (orig);
8. ABSTRACT OF RECORD ON APPEAL (1-17 vols.) (originals) (boxed);
9. APPELLANT'S OPENING BRIEF (orig, Sets 1 & 2)
10. Documents filed in the Court of Appeals, Division One (clipboard)
11. Instruments (4 parts) (boxed);
12. Minute Entries (boxed);
13. Depositions (5 vols) (ARLEIGH R. BURTON: HENRY KANANUAGH, OWEN L. WAGONER, M. SETH HORNE and MYRON HOWARD):
14. Exhibits (contained in one manila envelope and folder).

The copies of the abstract of record on appeal have been retained by the Court of Appeals, Division One, and are available upon request.

In the event the Supreme Court accepts the review, we will endeavor to secure and forward the remainder of the file.

Very truly yours,

CLASSIE GANTT, Clerk

By /s/ C. Walters
Deputy Clerk

SUPREME COURT
STATE OF ARIZONA

June 18, 1975
Filed:
June 18, 1975

FRANCIS M. COCKE, Appellant, v. JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, a divorced woman and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Appellees.	Supreme Court No. 12058-PR-2 Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472

The following action was taken by the Supreme Court of the State of Arizona on June 17, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review = Denied."

Vice Chief Justice Fred C. Struckmeyer, Jr. voting to grant.

Record returned to the Court of Appeals, Division One, this 18th day of June, 1975.

CLIFFORD H. WARD, Clerk
BY /s/ Mary A. Hopkins,
Deputy Clerk

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., and Arizona corporation, et ux, et al, Appellees.	No. 12058-PR-2 Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472 NOTICE OF SUBSTITUTION OF COUNSEL

NOTICE IS HEREBY GIVEN that RICHARD L. THOMPSON is substituted in place of L. ALTON RIGGS, JR., for the appellant herein.

DATED this 3rd day of July, 1975.

/s/ Francis M. Cocke
FRANCIS M. COCKE,
Appellant

/s/ R. Thompson
RICHARD L. THOMPSON, Atty.
for Appellant
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004

IN THE SUPREME COURT
STATE OF ARIZONA

FRANCIS M. COCKE, Appellant, vs. JAMES STEWART CO., an Arizona corporation; et ux, et al., Appellees.	NO. 12058-PR-2 Court of Appeals No. 1 CA-CIV 2970 Maricopa County No. C-222472 MOTION FOR REHEARING AND MEMORANDUM

Filed: July 3, 1975

Appellant, by counsel, moves the court for a rehearing on its order of June 18, 1975, denying review; the Honorable Fred C. Struckmeyer, Jr., voting to grant; for the reasons set forth in the memorandum attached hereto.

RESPECTFULLY SUBMITTED this 3rd day of July, 1975.

/s/ Richard L. Thompson
Richard L. Thompson
Attorney for Appellant
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004
254-7331

FACTS

The underlying cause was one for specific performance of a contract for the sale of realty and for damages. Defendant/ Appellant urgued and proved throughout the

life of the cause (athough, admittedly, not always succinctly) that he had performed all duties imposed on him by the original contract and that the specific relief prayed for could not be granted against him since another party to the contract, the escrow agent, was the one refusing to act. Nonetheless, the trial court modified the contract and awarded judgment of specific performance ordering the defendant to do that which could only be done by the escrow agent.

The court, in setting out to effect the relief that it could not grant since the balking escrow agent had not been a party defendant to the buyers' complaint, ordered the substitution of another escrow agent as an officer of the court and then caused the substitute agent to act.

A considerable number of motions, appeals, orders and amendments preceeded and followed in the cause. On or about January, 1974, Defendant brought a civil action arising out of these proceedings, in Federal Court and named the Honorable Eino M. Jacobson as one of the defendants, a Petition for Certiorari to the United States Supreme Court was allowed to be docketed in that cause on June 6, 1975.

The trial court judgments became final and appealable on the 30th day of September, 1974, and the defendant took issue with all orders and judgments, conditional, interlocutory and otherwise, entered therein and timely filed notice of appeal.

Prior to the time for filing the opening brief and based on the record and moving papers, the court summarily dismissed the appeal concluding that no substantial

issues were raised, the issues were precluded, the issues were frivolous and the appeal was brought for the purpose of delay.

In dismissing, the court awarded money damages to the appellees in the aggregate amount of $5,753.

THE DISMISSAL

The Order of the Court of Appeals summarily finds the most significant questions attempted to be raised by the appeal and, in doing so, by fiat overrules this court's holding in Stevens v. Mehagian, 90 Ariz. 43, 365 P2d 208 and holds contrary to the overwhelming majority opinion concerning conditional or interlocutory judgments. That is, the basic principle presented, or to have been presented to the appellate court concerned the question of finality of those interim orders and judgments entered in this multi-party suit. The court summarily decided that very issue by ruling that the mere attempt to litigate that question whether prior orders and judgments within the multi-party action were or were not "final" and "appealable" - was itself a display of frivolity and without substance, subject to sanctions.

The summary finding, prior to the filing of an opening brief and based only on the record, the notice of appeal and moving papers denies the appellant the right to appeal, denies the citizens of Arizona authority for determining when and what to appeal from, and reverses this court while foreclosing the raising of the fundamental question ever again under fear of sanction.

THE SANCTIONS

Appellant was sanctioned for having attempted to appeal from that which can, more than merely arguably, be presented as gross error in the trial court and a perversion of long standing lawful principles.

Assuming, if you will, that the judgment for specific performance entered by the trial court on September 27, 1972, and conditioned on the future performance of certain acts by both plaintiff and defendant, was a "conditional judgment"; then, the judgment was not appealable at the time it was entered and all orders and amendments subsequent and ancillary thereto would "automatically be considered on appeal from the final order or judgment itself." Order, Court of Appeals, 24 February, 1975, at Page 2.

The mere attempt of appellant to appeal from a "conditional judgment" and orders and amendments ancillary thereto resulted in the claim of "frivolity", a declaration of frivolity and the conclusion that the appeal was solely for the purpose of delay.

Indeed, appellant's land had been conveyed, appellant had been convicted of criminal trespass without having been ousted, appellant's proceeds from the sale and interest on the purchase approximately $80.00 per day, had been denied for over four years and the court finally, on September 30, 1974, found that the buyer had complied with the "court modified" contract - it is difficult to imagine benefit to the appellant by delay.

As previously admitted, appellant's pleadings, motions and procedures were not always succinct and surely can be characterized as "prolix" but nonetheless, if openly reviewed, merely establish his zeal and frustration in good faith attempts to appeal from fundamental error (the trial court's "modifying" a contract, severence of clauses of a contract, ordering specific performance by appellant of duties which, under the agreement, could only be performed by the escrow agent). The appellant's effort to timely appeal from conditional or interlocutory judgments, when they became appealable cannot reasonably lead to the appellate court's finding the appeal to have been, "taken solely for delay and frivolous and an abuse of the appellate process" (Order, 24 Feb. 1975 at p.2) and result in sanctions.

THE TRIBUNAL

As previously stated, appellant filed a civil action in the U.S. District Court, District of Arizona, CIV 74-20. The Honorable Eino M. Jacobson, in his individual capacity and not official capacity, was named as one of the defendants. The subject matter of the complaint arose directly out of the action herein, specifically, the real estate transaction and subsequent state court litigation.

The appellant filed the notice of appeal herein subsequent to bringing the Federal Court action.

At the time of filing of the notice of appeal herein there were three departments in the Division One of the Court of Appeals.

The order summarily dismissing the appeal and awarding sanctions was issued on February 24, 1975, by Department B, the Honorable Eino M. Jacobson presiding.

On June 6, 1975, a Petition for Certiorari to the United States Supreme Court was docketed in Cause CIV 74-20.

Without inferring or even attempting to infer that the court was wrongfully influenced by the pending civil action, it is respectfully submitted that the Supreme Court has held:

> ". . . a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . every procedure which would offer a possible temptation to the average man as a judge . . . denied . . . due process."
> In the Matter of Lee Roy Murchison and John White, 349 US 133, 99 L.Ed. 942, 75 S.Ct. 623 (1954).

Appellant, by counsel, respectfully requests the Court to grant review herein.

RESPECTFULLY SUBMITTED this 3rd day of July, 1975.

/s/ Richard L. Thompson
Richard L. Thompson
Attorney for Petitioner
132 S. Central Ave., Suite 7
Phoenix, Arizona 85004

Supreme Court, U. S.
FILED
NOV 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

Hubert E. Kelly, Esq.
550 West Washington
Phoenix, Arizona 85003
and
Wallace O. Tanner, Esq.
Tanner, Jarvis & Owens
3800 N. Central Avenue
Phoenix, Arizona 85012

Attorneys for Respondents:

James Stewart Company, M. Seth Horne, Maurine D. Horne, and Title Insurance Company of Minnesota

November 5, 1975

I N D E X

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

This is a brief in opposition to the petition of Francis M. Cocke for a writ of certiorari to review the order entered by the Court of Appeals for the State of Arizona on February 24, 1975. The brief is due on November 10, 1975.

OPINION AND JUDGMENTS BELOW

Respondents agree with the petitioner's summary of the opinion and judgments below.

JURISDICTION

Respondents do not agree with petitioner's statement of jurisdiction in this court. To invoke the jurisdiction of the court under 28 U.S.C. § 1257(3) requires that a substantial federal question be presented. Save in exceptional circumstances, this court must accept as controlling a decision of the state courts on questions of local law, both statutory and common. American Ry. Express Co. v. Commonwealth of Kentucky, 273 U.S. 269 (1927). Moreover, impairment of contract by judicial decision does not raise a federal question. Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632 (1912).

Respondents also maintain that the instant petition is merely a restatement of petitioner's prior petition in Francis M. Cocke v. Irwin S. Cantor, et al, No. 74-1532 (October Term, 1974), certiorari denied October 6, 1975, Petition for Rehearing filed October 29, 1975.

Upon the foregoing reason, the court has no jurisdiction under 28 U.S.C. § 1257(3) and the petition should be denied.

QUESTIONS PRESENTED

Whether the state court had jurisdiction to enter the judgment in the suit for specific performance and damages between the buyers and petitioner, and whether, as a matter of state law, it erred in so doing.

STATEMENT OF THE CASE

Initially, this action arises out of a real estate transaction and resulting state court litigation. Respondents are the vendees and escrow agents involved in the transaction.

In 1964, petitioner and his ex-wife made a property settlement agreement, pursuant to which a trust was established. They were divorced in 1967. Certain property held by them and the trustee was agreed to be sold in 1968 to James Stewart Company (or its nominee the respondents Horne). Transamerica Title Insurance and Trust Company (hereinafter referred to as Transamerica) was the escrow agent. A dispute arose between the petitioner and his ex-wife over payment instructions and after the refusal of the petitioner to execute certain documents, the buyer brought suit for specific performance. James Stewart Co. v. Cocke, Civil No. C-222472, Maricopa Cty., Ariz. Super. Ct., filed April 22, 1969. Transamerica was joined in this action as an additional defendant by petitioner seeking damages for the alleged mishandling of the escrow transaction. It answered and counterclaimed against petitioner,

seeking attorneys' fees and costs. Thereafter, it moved for summary judgment which was granted, resulting in an award of attorneys' fees. The underlying payment dispute between petitioner and his ex-wife was litigated in post-divorce proceedings in which the court held, among other things, that the sale property had been placed outside of the trust. Cocke v. Cocke, Civil No. D-89833 (Maricopa Cty., Ariz. Super. Ct., filed December 31, 1968 and March 15, 1969), aff'd. 13 Ariz. App. 57, 474 P.2d 64 (1970).

In a series of judgments, the state trial court dismissed the petitioner's counter and crossclaims against his ex-wife and other parties in the specific performance action, James Stewart Co. v. Cocke, supra, (November 10, 1970), aff'd. sub. nom., Cocke v. Transamerica Title Insurance Co., 16 Ariz. App. 556, 494 P.2d 756 (1972), and entered judgment against petitioner ordering the sale consummated. James Stewart Co. v. Cocke, supra, (September 27, 1972). A subsequent appeal to the Arizona Court of Appeals was dismissed on the grounds of not being timely filed. James Stewart Co. v. Cocke, Civil No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). Following denial of petitioner's motion for rehearing, he refused to comply with the judgment of September 27, 1972 and respondents James Stewart Company and the Hornes, upon application to the state trial court, obtained a writ of assistance to enforce the September 27, 1972 judgment. (Petitioner's appendix, pp. 130-152)

Thereafter, petitioner brought suit under the Civil Rights Act in federal district court in Arizona. Respondents here, and others, were defendants in that action, all of whom filed motions to dismiss on various grounds. The district court dismissed petitioner's complaint with prejudice and, upon appeal, the Ninth Circuit Court of Appeals affirmed. Petitioner filed a petition for certiorari in this court which was denied. See Francis M. Cocke v. Irwin S. Cantor, et al, No. 74-1532 (October Term, 1974), certiorari denied October 6, 1975, petition for rehearing filed October 29, 1975.

In the interim, on November 27, 1974, petitioner filed a second appeal from the judgment entered on September 27, 1972, as well as other judgments and orders taken against petitioner in real estate transactions ranging in time from November 10, 1970 to September 30, 1974. Respondents James Stewart Company and the Hornes moved to dismiss that appeal as (1) frivolous, and (2) untimely; and for sanctions on grounds that the appeal was not instituted in good faith. On November 24, 1975, the Arizona Court of Appeals dismissed petitioner's appeal. Cocke v. James Stewart Co., et al, CIVIL NO. 1-CA-CIV-2306 (Ariz. App. Feb. 24, 1975) See petitioner's appendix, Vol VI pp. 542-546. Subsequent motions for rehearing and petition for review to the Supreme Court of Arizona followed without success and this petition was initiated.

ARGUMENTS

Petitioner contends that three state court judgments were entered without subject matter jurisdiction. The three grounds for this contention are set forth in page 10 of petitioner's petition for writ of certiorari and are referred to as alteration of contract, indispensable parties, and want of findings.

I.

Petitioner contends that the buyer's judgment of September 27, 1972 fundamentally altered the escrow agreement for the sale and purchase of land, and that the court was plainly without jurisdiction to render judgments which altered the agreement of the parties. Respondents maintain that there was no fundamental alteration of the escrow agreement and that the state court was acting in the full scope of its equity powers.

The dispute in the instant case, centers around a suit for specific performance brought by the buyers, James Stewart Co., pursuant to an escrow agreement. The authorities are unanimous in holding that the remedy of specific performance is purely equitable in nature. Klein v. Shell Oil Co., 386 F.2d 659, 663 (8th Cir. 1967). The state court was, therefore, acting as a court of equity. Equity jurisdiction is exercised in personum and depends on the court's control over the person of the parties. McNulty v. Heine, 137 F. Supp. 508. 511 (D. Md. 1956), and the cases cited therein. It

is an established principle that where the parties are before a court of equity, it has jurisdiction to decree specific performance of a valid contract. 81 C.J.S. Specific Performance § 115 pp. 648-49. The state court, in the buyer's suit for specific performance, had jurisdiction over both the defendants and the property involved in the agreement. Petitioner himself invoked the jurisdiction of the superior court in June, 1969 in his answer and counterclaim. Further, the legal description of the real property attached to the complaint shows that the property involved in the state court litigation was located in Maricopa County and was, therefore, clearly within the state court's jurisdiction. Respondents respectfully submit that the state court, having jurisdiction over the person and property of petitioner, had jurisdiction to enter the judgments which petitioner now seeks to relitigate.

Petitioner argues that the state court fundamentally altered the escrow agreement and that it was without the power to do so. In support of this proposition, petitioner cites Goodman v. Newzona, 101 Ariz. 470, 421 P.2d 318 (1967). Respondents maintain that Goodman is distinguishable from the instant case because there the court was enforcing the contract as written, inasmuch as to do otherwise would have defeated the intent of the parties. The plaintiff, in Goodman, brought an action asking that a deed be declared void and that Newzona be declared to have no right, title or interest in the

property. The agreement between Goodman and Newzona contained a full performance clause which was expressly stated to be a condition precedent to the right of conveyance and the right to performance. The court stated that where the parties bind themselves by a lawful contract, a court must give effect to the contract as it is written and the terms of the contract are conclusive where they are clear and unambiguous. The intent of the parties, in Goodman, was clear and the contract could not be altered to eliminate the full performance clause without defeating that intent. In the instant case, the court merely imposed a different date for compliance with the agreement. This, in no way defeated the clear intent of the parties, but served to further it.

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies. Brown v. Board of Education, 349 U.S. 294 (1955). It is well established that an equity court has the power to mold its remedies to the needs of a particular situation. Bowles v. Skaggs, 151 F.2d 817 (6th Cir. 1945). The agreement in the instant case provided for a 13-day grace period for compliance. The September 27, 1972 judgment ordered that the annual installments due by the buyers "shall commence one year after the expiration of the period for appeal." Petitioner contends that the September 27, 1972 judgment altered the escrow agreement by adding thereto some four years and eight months. However, the essence of equity jurisdiction is the power of a

judge to do equity and to mold each decree to the necessities of the particular case. Hecht Co. v. Bowles, 321 U.S. 321 (1944). Equity will administer such relief as the exigencies of the case demand at the close of a trial. Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621 (1950) [emphasis added]

Respondents respectfully submit that the state court judge was acting within his broad discretionary powers in granting equitable relief. Century Investment Corp. v. United States, 250 F.2d 139 (9th Cir. 1958), cert. denied 356 U.S. 950. The state court, therefore, had proper jurisdiction to render the judgment of September 27, 1972 extending the time for compliance.

II.

Petitioner contends that the state court had no jurisdiction to enter judgment in the absence of an indispensable party, Transamerica Title Insurance Company. In support of this contention, petitioner further claims that Transamerica was never joined by the buyers in their suit for specific performance. However, respondents would point out that Transamerica was before the court because it was joined by petitioner himself in a counterclaim seeking damages for the alleged mishandling of the escrow transaction. In addition, the district court addressed itself to this issue saying:

> "It is well settled that the considerations in Rule 19(b) [F.R.C.P.] are equitable, not jurisdictional. 'To say that a

> court must dismiss in the absence of an indispensable party and that it cannot proceed without him puts the matter the wrong way around: a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him.'" Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119. [Brackets supplied]

Respondents respectfully submit that because Transamerica was properly before the state court and because Rule 19 considerations are equitable, not jurisdictional, petitioner's second jurisdictional argument is without merit.

III.

Petitioner contends that the court's failure to make sufficient findings was a jurisdictional defect and, therefore, a violation of the right to due process. Respondents maintain, however, that want of findings is not a jurisdictional defect and that the findings of the state court were sufficient.

Findings are not a jurisdictional requirement, but only aid appellate courts in reviewing the decision below. Securities & Exchange Commission v. Frank, 388 F.2d 486 (2nd Cir. 1968). The purpose of requiring a trial court to state facts specifically is to aid

the appellate court in its review, and merely indicating a factual basis for ultimate conclusions will suffice in most cases. United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968). In the instant case, the trial court made findings (see petitioner's appendix pp. 119-123). Findings of the trial court are to be construed liberally in support of the judgment, even though they are not as explicit or detailed as might be desired. Travelers Insurance Co. v. Dunn, 228 F.2d 629 (5th Cir. 1956). Petitioner, citing United States v. Aluminum Co. of America, 44 F. Supp. 97 (D.C.N.Y. 1941), asserts that an equity court must make meticulous findings. In Aluminum Co., however, the trial court made an oral opinion in a complex antitrust case and the court of appeals found the findings insufficient. The findings in the instant case, however, were sufficient to indicate a basis for the court's conclusion. Findings of fact need only be made in sufficient detail and exactness to indicate the factual basis for the ultimate conclusion reached by the court. S.S. Silberblatt, Inc. v. United States, 353 F.2d 545 (5th Cir. 1965). Respondents respectfully submit that sufficient findings were made and that want of findings is not jurisdictional. Petitioner's third contention therefore fails.

IV.

Rule 19 of the Rules of the Supreme Court states that:

> "A review on writ of certiorari is not a matter of right, but of sound

> judicial discretion, and will be granted only where there are special and important reasons therefor."

Certiorari will be granted when the decision below involved an important question of construction of a federal statute and when two or more courts of appeals had previously reached a contrary result. United States v. Muniz, 374 U.S. 150 (19). Petitioner has not shown any question of construction of a federal statute and has failed to show any conflict between the circuits. Rule 19 also establishes that certiorari will be granted,

> "where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Petitioner has simply failed to set forth any reason for granting of the writ. Respondents respectfully submit that there is no federal question involved in the instant case and there is no showing by petitioner of any conflict of circuit decisions with each other or with decision of this court.

CONCLUSION

For the reasons set forth above, respondents respectively submit that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1975, three copies of the brief in opposition to petition for a writ of certiorari were hand delivered or mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA DIVISION I, DEPARTMENT B

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNE-SOTA, a Minnesota corporation, Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA DIVISION I, DEPARTMENT B

The Respondent, JOAN H. COCKE, respectfully represents that the Writ of Certiorari should not be granted to review the judgment of the Court of Appeals of the State of Arizona, Division I, Department B, entered in CA-CIV-2970 (Maricopa County Superior Court No. C-222472) on February 24, 1975.

The Petitioner, FRANCIS M. COCKE, and this Respondent, JOAN H. COCKE, his former wife, on October 9, 1968 entered into an agreement to sell certain real property to JAMES STEWART COMPANY, an Arizona corporation, or its nominee. The portion of the property agreed to be sold by JOAN H. COCKE had previously been in trust.

When the sale was not consummated, an action for specific performance was commenced by the buyers, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, against the Petitioner, FRANCIS M. COCKE, and JOAN H. COCKE (A.173).

The Petitioner, FRANCIS M. COCKE, answered the Complaint and filed a Counterclaim against the Plaintiffs and TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA and a Cross-Claim against this Respondent, JOAN H. COCKE (A.179).

As stated by Petitioner, the trial court ordered the Petitioner to amend his pleadings so as to separately state his claim against each of the other

parties. Petitioner failed to amend his Cross-Claim against the Respondent, JOAN H. COCKE, and as stated by Petitioner, judgment was entered in her favor and against the Petitioner (P.10).

The judgment was based upon a motion for judgment in favor of the Cross-Defendant against the Cross-Claimant, FRANCIS M. COCKE. This judgment was entered November 10, 1970 (A.106). Contrary to the Petitioner's contention, this judgment could not and did not alter any agreement. No appeal was taken from this judgment. However, at this late date in the Notice of Appeal (A.497) from the trial court's order of September 30, 1974 approving account of court appointed officer and ordering distribution of funds (A.165), Petitioner attempts to revive all previous judgments and orders involved in this matter.

The order of the Court of Appeals of the State of Arizona, Division I, Department B, which Petitioner would have this court review, states that there are seven such orders and judgments which have since become final (A.543). The judgment in favor of this Respondent is set forth as Item 5 of the Notice of Appeal (A.498). With respect to these seven final orders or judgments the Court of Appeals found:

"All of these orders and judgments are already final, res judicata, and not subject to the subsequent, collateral attack appellant is attempting here. The attempted appeal from items two through seven therefore confers no jurisdiction on this Court, as all of such matters are patently non-appealable, and knowledge thereof must be imputed to both appellant and his counsel. The Court therefore regards the purported appeal therefrom as taken solely for delay and frivolous and an abuse of the appellate process." (A.544).

The appeal was dismissed as to Items 2 through 6 for lack of jurisdiction and the entire appeal was dismissed as frivolous (A.545-546).

Petitioner's allegations that he has in some manner been deprived of any right, privilege or immunity secured or protected by the Constitution and laws of the United States because of all the proceedings had in this matter in the State Courts are abstractions. His contentions are absurd.

Petitioner calls this Court's attention to the fact that he has filed a previous Petition for Writ of Certiorari in this Court (Docket No. 74-1532) arising out of this same litigation (P.26). This Petition was denied October 6, 1975 and the present Petition was dated October 9, 1975.

This Petition should also be denied as there are no reasons for granting the Writ under Rule 19(1)(b), Rules of the United States Supreme Court.

Respondent respectfully submits that this Petition for Writ of Certiorari is frivolous and is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1975, three (3) copies of the Opposition to Petition for Writ of Certiorari to the Court of Appeals of the State of Arizona, Division I, Department B, were served on each party separately represented, by depositing the same in the United States Post Office at Phoenix, Arizona, first class postage prepaid, addressed to counsel of record at their respective post office addresses as hereinafter set forth. I further certify that all parties required to be served have been served.

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IN THE

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October Term, 1975

No. 75-556

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v.

JAMES STEWART COMPANY, et al., Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNESOTA, A Minnesota corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

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OPINION AND JUDGMENTS BELOW

On November 27, 1974, the petitioner sought to appeal to the Arizona Court of Appeals from eight orders and judgments entered by the Superior Court of Arizona in Cause No. C222472. The judgments were entered at various times beginning November 10, 1970, through September 30, 1974. The statutory period for appeal in the State of Arizona is sixty (60) days from the entry of the judgment or order appealed from. Rule 73(b), Arizona Rules of Civil Procedure.

The only judgments that involved respondent Transamerica Title Insurance Company are the judgments entered in favor of Transamerica Title Insurance Company on November 10, 1970, and the judgment upon supersedeas bond and costs entered November 6, 1972. The notice of appeal as to both judgments was filed on November 27, 1974. On February 13, 1975, Transamerica Title Insurance Company of Arizona moved to dismiss the appeal and to impose sanctions for the reason that the appeal was patently untimely and was an attempt to re-appeal a case already previously decided by the Appellate Courts of the State of Arizona. On February 24, 1975, the Court of Appeals entered its Order dismissing the appeal and imposing sanctions. Petitioner did not, during the trial or appellate procedures before the Arizona courts, request a direct ruling by the state courts on any claimed Federal rights.

QUESTION PRESENTED

Does the dismissal of an appeal filed more than two years after the entry of the orders sought to be appealed present a genuine Federal question for review?

ARGUMENT

Petitioner has simply ignored the basis upon which the Arizona Court of Appeals dismissed his attempted appeal and is now attempting to lead this Court to believe that a genuine Federal question does exist for review. The facts are:

Petitioner sought to appeal from eight separate judgments and orders entered in the Superior Court of Maricopa County in Cause No. C 222472. The judgments were entered in said cause from November 10, 1970, to September 30, 1974. However, the only judgments that involved the respondent Transamerica Title Insurance Company are the summary judgments in favor of Transamerica entered November 10, 1970, and the judgment upon supersedeas bond and costs entered November 6, 1972.

The notice of appeal as to Transamerica Title Insurance Company was filed on November 27, 1974, over four years after the judgment of November 10, 1970, and two years after a judgment of November 6, 1972. The statutory time for appeal in the State of Arizona

is, pursuant to Rule 73(b), Arizona Rules of Civil Procedure, 60 days from the entry of the order or judgment sought to be reviewed.

An appeal two years after the entry of one order sought to be appealed and four years after the entry of the other order sought to be appealed is patently untimely. Furthermore, petitioner's attempt at appeal was in fact a second appeal by petitioner from the very judgments sought to be reviewed. The judgment of November 10, 1970, was appealed by Mr. Cocke and affirmed by the Arizona Court of Appeals in Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756.

The Order entered on November 6, 1972, granting judgment upon supersedeas bond and costs was likewise appealed by petitioner and dismissed by the Arizona Court of Appeals as a frivolous appeal on October 2, 1973. In that dismissal, the Court of Appeals stated:

> ". . . It is the opinion of the Court that the appeal from the judgment in favor of Transamerica Title is frivolous."
> Appendix to Petition for a Writ of Certiorari, Volume V, pages 451-452.

It is abundantly apparent that the Court of Appeals dismissed petitioner's attempted appeal as to Transamerica Title for the very obvious reason that the appeal was untimely as to both judgments sought to be reviewed by the appeal. It is likewise abundantly apparent that the Court

of Appeals justifiably imposed sanctions for the reason that the appeal was not only patently untimely but was in fact an attempt to re-appeal from judgments already ruled upon by the Arizona Court of Appeals. Arizona Revised Statutes, Section 12-2106 specifically provides:

> "When the supreme court is of the opinion that an appeal has been taken for delay, and that there was not sufficient grounds for taking an appeal, it may include in its judgment an additional amount, not exceeding ten per cent of the judgment appealed from, if the judgment is for the recovery of money, and not exceeding five hundred dollars in other cases, as damages for a frivolous appeal."

Certainly under the facts of this case where the appellant simply ignores the 60-day jurisdictional requirements for appeal and attempts to appeal one order over four years after its entry and the second order over two years after its entry, in a case where both orders have previously been appealed and decided adversely to appellant, it cannot be said that the Court of Appeals abused its discretion in imposing sanctions.

> "This Court has not held that a State is required by the Federal Constitution 'to provide appellate courts or a right to appellate review at all.' " Re Gault, 387 US 1, 18 L ed 2d 527, 87 S Ct 1428

It follows, that a state may lawfully impose reasonable regulations as to time and content of appeals. In the case at bar, there is no contention that the Arizona appellate limitations as to time and content are unreasonable, arbitrary, discriminatory or in any way unlawful.

In summary, petitioner attempted to appeal long after the statutory 60 days had expired. His appeal was promptly dismissed as untimely. The dismissal simply does not present any Federal questions for review.

Respectfully submitted,

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I hereby certify that on this 5th day of November, 1975, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-556

FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, et al, Respondents.

REPLY TO RESPONSES TO

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

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FRANCIS M. COCKE, Petitioner,

v.

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife; JOAN H. COCKE, a divorced woman; TRANS-AMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation; TITLE INSURANCE COMPANY OF MINNE-SOTA, a Minnesota corporation,
Respondents.

REPLY TO RESPONSES OF

1. JAMES STEWART COMPANY, M. SETH HORNE AND MAURINE D. HORNE, TITLE INSURANCE COMPANY OF MINNESOTA
2. TRANSAMERICA TITLE INSURANCE COMPANY
3. JOAN H. COCKE

TO

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION I, DEPARTMENT B

REPLY

Petitioner here replies to the brief of James Stewart Company, M. Seth Horne, Maurine D. Horne, and Title Insurance Company of Minnesota. The arguments presented by respondents Transamerica Title Insurance Company and by Joan H. Cocke are believed to be encompassed in the brief here replied to.

Respondents at page 2 of their brief cite American Ry. Express Co. v. Kentucky, 273 U.S. 269 (1927 for the long-standing rule that this Court does not interfere with state courts upon questions of purely local law, both statutory and common, unless, as the Court stated, citing three of its earlier decisions:

> ". . .the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'."

In view of the facts of the case at bar, the trial court judge's splitting of the action involving indispensable parties, the judge's refusal to find facts to support his conclusions, and the judge's alteration of the underlying contract, it follows that without more both of these conditions to review have been met, even had no federal rights been directly violated. Nonetheless, federal rights have been violated. The trial court proceeded after divesting itself of jurisdiction and it is elemental that "no judgment of a court is due process of law if rendered without the jurisdiction in the court. . . ." Scott v. McNeal, 153 U.S.

34, 46 (1896); Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 15 (1907).

The old doctrine followed by Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632 (1912), cited at page 2 of respondent's brief, was first propounded before the Civil War. While not necessarily involved in the instant case in view of the 14th Amendment, 42 U.S.C. Section 1981, and later decisions of this Court (pp. 24 - 26 of petition and Manufacturers' Finance Co., v. McKay, infra, on alteration of contracts), the startling incongruities in respondent's and Cross Lake's statement of the doctrine raise this fundamental question: since "No State shall. . .pass any . . .law impairing the obligation of contracts", by what authority can a state pass a law setting up a court with power to impair the obligation of contracts?

Respondents maintain that the instant petition is merely a restatement of Cocke v. Cantor, et al., 74-1532. Although that cause arose from the facts of this case, the underlying complaint sought civil damages in federal court under the Civil Rights Act. The cause here was still pending in state court when that action was commenced.

RESPONDENTS' STATEMENT OF THE CASE

A few misstatements by respondents in their statement of the case are noted here.

Respondent Title Insurance Co. of Minnesota, a Minnesota corporation, was not a party to the October 9, 1968 escrow agreement as made by the parties thereto. Minnesota Title did not come into the picture until October 31, 1973, at which time that

corporation was appointed by the trial court upon application therefor by the Buyers (A. 130), as an officer of the court to close the escrow in the place and stead of Transamerica, because Transamerica had remained unwilling, throughout the term of the escrow agreement and litigation, to comply with the instructions contained in the agreement as made by the parties and with the instructions contained in the agreement as remade by the trial court judge.

Respondents in their statement of the case discuss the Cocke trust but fail to mention that the Arizona courts held the trust to be irrevocable, yet subsequently ordered the trust land proceeds to be paid outside of the trust without regard or even notice to the remaindermen. In any event, a dispute as to the disposition of the proceeds in no way relieved the Buyers or Transamerica from their obligations to comply with the terms of the escrow agreement. Unless this case is to go down in history as establishing the precedents that state court judges may at their discretion rewrite valid trust and escrow agreements and enforce them as rewritten, the question of the disposition of trust land proceeds is moot.

Respondents refer to "the refusal of petitioner to execute certain documents", so covering up the material and fundamentally decisive fact that the only document petitioner refused to execute was a spurious warranty deed prepared by the Buyers and left with the escrow officer with instructions to secure F. M. Cocke's signature thereon. This deed included the right of way of a large drainage canal bordering the land actually proposed to be sold. The Cockes had never acquired title to

this right of way, and it was specifically excluded from the proposed sale by the property descriptions attached to the escow agreement, and was not the subject of any contract entered into by F. M. Cocke. The court never found a specific failure of petitioner to perform any duty, let alone a failure to execute a deed. Indeed, this failure to make findings was a fundamental denial to petitioner of due process.

If the above attempt to secure the warranty deed to land that F. M. Cocke did not own had been successful, it would have resulted in a long delay in close of escrow pending successful conclusion of a quiet title suit against the unknown heirs of a prior owner, with a saving in interest charges against Buyers of more than $80.00 per day. At the time of the attempt, F. M. Cocke's proper deeds (A. 81, 85), bearing the same metes and bounds descriptions as Buyers' judgment of September 27, 1972 (A. 116-118, 123-126), had been in escrow for more than two months. His proper instructions governing the disposition of proceeds from the proposed sale of the trust land, required by the terms of deposit of the trustee Bank's deed (A. 80), had been in escrow since January 21, 1969. Although Buyers in their complaint (A. 173, 176) claimed F. M. Cocke refused to execute the mortgage releases, this claim also was without foundation.

Respondents state that petitioner joined Transamerica for damages resulting from mishandling the escrow transaction. Such is not the case. Although petitioner asked for damages, the relief sought was the return of Sellers' deeds as provided for by the cancellation provisions of the agreement (A. 173, 224-226).

Contrary to respondents' statement in their response at page 4, the state trial court did not dismiss petitioner's counter and cross claims, but split them into separate and independent claims against each of the other three parties to the agreement.

Respondents' statement as to the dismissal, like their statement that Buyers' specific performance action was affirmed by Cocke v. Transamerica, 16 Ariz. App. 556, 494 P.2d 756 (March, 1972), is a misstatement of fact and misleading, and is apparently taken from the almost identical statement contained in the Memorandum and Order of the federal district court in 74-1532 (A. 157, 158, 159). Buyers' conditional judgment was not entered until September 27, 1972 (A. 116), and Cocke v. Transamerica, supra, in which petitioner pointed to the court's lack of jurisdiction in the absence of Buyers and Joan H. Cocke, was decided in March, 1972. Buyers' final judgment against F. M. Cocke, which affirmed that the September 27, 1972 judgment was merely a conditional judgment by ruling that at least one of the specified conditions had been fulfilled, was not entered until September 30, 1974 (A. 165).

The timely appeal from this final judgment of September 30, 1974 was dismissed February 24, 1975 (A. 542) as frivolous, along with the other earlier judgments or orders merged in the final judgment, on the claimed ground of res judicata. Transamerica's judgments were summary, as was the minute order of November 10, 1970 granting specific performance to Buyers.

RESPONDENTS' ARGUMENTS

I.

ALTERATION OF CONTRACTS

Respondents claim that the trial court's adding over four years to the escrow agreement for Buyers to perform, in the face of petitioner's 13-day notice of cancellation, was within the court's equity jurisdiction. The alteration, in effect, deleted all cancellation provisions from the agreement, long after the agreement was cancelled in accordance with their terms.

Respondents cite two cases and C.J.S. in support of the well-settled rule that specific performance of a valid contract (not selected parts thereof, as here) is within the equity jurisdiction of a court, and later cite five more cases for the equally well-settled rule that in equity a judge can grant such relief as the circumstances demand, in order to do equity.

In support of the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh, the Court in Manufacturer's Finance Co. v. McKay, 294 U.S. 442, 449, 79 L.Ed. 982, 986 (1935), said:

> "But it is well settled, this court said in Hedges v. Dixon County, 150 U.S. 182, 189, 37 L.Ed. 1044, 1047, 14 S.Ct. 71, 'that a court of equity, in the absence of fraud, accident or mistake, cannot change the terms of a contract'."

There have been no allegations of accident or mistake in the instant case, nor any allegations of fraud even attempted to be perpetrated by F. M. Cocke.

As pointed out by Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318, 320 (1967), where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. In the instant case there have been no allegations that the cancellation provisions are other than clear and unambiguous, or that Buyers or their counsel, Wallace O. Tanner, were not aware of their terms.

II.

INDISPENSABLE PARTIES

At pages 9, 10 of respondents' brief, they challenge in the language of the district court in 74-1532 petitioner's claim that Buyers' failure to join Transamerica, as the escrow agent and title insurer under the escrow agreement, left the court without subject matter jurisdiction over Buyers' action for specific performance of the escrow agreement.

Respondents have misconstrued Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968). As pointed out in respondents' quotation, "a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him". But as plainly specified by Rule 19(a), 16 A.R.S. and Federal Rules of Civil Procedure, a person in whose absence complete relief cannot be

accorded among those already parties shall then be joined, where plainly subject to joinder as here. In any event, Transamerica was brought before the court by petitioner, the court was made fully aware that as escrow agent and title insurer Transamerica was indispensable to specific performance of the escrow agreement, and then proceeded to sever the action. Even a cursory examination of Buyers' complaint (April, 1969; A. 173) reveals that it sought as relief issuance by Transamerica of its title policies and delivery to the Buyers of the deeds and mortgage releases held by Transamerica. A copy of the agreement of the parties (A. 54-79) was attached to the complaint.

Further, the Buyers admitted that specific performance of the escrow agreement could not be attained without action by Transamerica. On September 7, 1973 they applied for a writ of assistance ordering Transamerica's performance (A. 130, 141-145: items 11, 12, 13; items 1-4 of prayer). However, in its Order of October 31, 1973 granting the writ, the trial court found that Transamerica remained unwilling to act in any manner in connection with the escrow agreement as modified by Buyers' judgment of September 27, 1972, and proceeded to substitute Minnesota Title as escrow agent, with all of Transamerica's rights, privileges and duties (A. 146, 147, 148, 149).

A writ of assistance can only issue against parties joined in the action. In Howard v. Milwaukee & St. Paul R. Co., 101 U.S. 837, 849, 25 L.Ed. 1081, 1084 (1880), citing Terrel v. Allison, 21 Wall. 289, 292, 22 L.Ed. 634, 635 (1875), the Court said:

> "Authorities are scarcely needed to support these propositions, it being universally admitted that

> writs of assistance can only issue against parties affected by the decree, which is only saying that the execution cannot exceed the decree which it enforces; . . ."

In Terrell V. Allison the Court also stated the longstanding rule that the power of a court to enforce its judgment or decree is coextensive with its jurisdiction over the subject matter: where without power to enforce the judgment, it is without jurisdiction. See Rule 12(b)(7,6,1) 16 A.R.S. and Federal Rules of Civil Procedure; Federal Rule 12(h)(2,3), Arizona Rule 12(i)(2,3).

Mosher v. Hiner, 62 Ariz. 110, 154 P.2d 373 (1944), cert. den. 325 U.S. 874, held that any person interested in the subject matter of action who has a personal interest in the judgment is a "real party in interest" within the statute regarding parties, and unless joined in the action he cannot be bound by the judgment, citing the Arizona Code, 1939, Section 21-501, now 16 A.R.S. Rule 17(a) and Federal Rules of Civil Procedure 17(a).

Respondent's reliance on the district court's pronouncement that Rule 19(b) is equitable, not jurisdictional, and is controlling here, is misplaced. Rule 19(b) applies only when joinder is not feasible. In the case at bar, the indispensalbe parties were clearly subject to service and joinder: the provisions of Rule 19(a) control, and joinder is mandatory, not equitable.

In the district court's quoted case, Provident Tradesmens Bank & Trust v. Patterson, supra, the Court at U.S. 121, 122, L.Ed. 951, quoted and approved the early

case Mallow v. Hinde, 12 Wheat. 193, 6 L.Ed. 599, which upheld the dismissal of the complaint even though the absent party could not be joined because not within the territorial jurisdiction of the lower court, on the fundamental principle that no court can adjudicate directly upon the rights or obligations of a real party in interest without that person being before the court.

This same fundamental principle was adhered to by this Court in Salem Trust Company v. Manufacturers' Finance Company, 264 U.S. 182, 190, 68 L.Ed. 628, 631 (1924). Citing Wilson v. Oswego Township, 151 U.S. 56, 38 L.Ed. 70 (1894), and Massachusetts & S. Construction Co. v. Cane Creek (1894), 155 U.S. 283, 39 L.Ed. 152, the Court pointed out that where the object of the suit is to recover possession of personal property, the one in possession is a necessary and indispensable party.

The doctrine of these cases is embodied in Rule 19(a). The obvious confusion as to the intended effect of the amendment to Rule 19 merits consideration by this Court. The status of real parties in interest, Rule 17(a), should be clarified.

In the circumstances of this instant case there was a controlling reason why Buyers were indispensable in any determination of Transamerica's rights to attorney fees from F. M. Cocke under paragraphs 8, 9 or 10 of the escrow agreement (A. 59, 60), and also why Transamerica was indispensable in any determination of Buyers' right under paragraphs 16, 17 and 18 of the agreement (A. 62) to have the escrow closed instead of cancelled.

Under paragraph 18, cancellation is

plainly mandatory and self-executing in the event of the Buyers' failure to timely comply. The escrow agreement, and any rights of Transamerica thereunder, except for its right to the relatively minor charges provided for by paragraphs 19-21, become automatically cancelled: Buyers' failure to comply has put an end to Transamerica's rights under its paragraphs 8, 9 and 10. Patently, a final determination of whether or not Transamerica was entitled to the attorney fees could not be made without first determining whether the agreement had become cancelled by Buyers' failure to comply.

Likewise, under paragraph 24 (A. 64) cancellation is also mandatory and self-executing in the event of the unwillingness or inability of Transamerica as escrow agent to comply with the escrow instructions, or the unwillingness of Transamerica as title insurer to issue a title policy. No notice to or by any party is required. Except for Transamerica's rights to escrow charges, the escrow agreement and any rights of Buyers thereunder become automatically cancelled: Transamerica's unwillingness or inability has put an end to Buyers' rights. Patently, a final determination that Buyers were entitled to have the escrow closed instead of cancelled could not be made without first determining whether the agreement had become cancelled by Transamerica's unwillingness or inability as escrow agent to comply or its unwillingness as title insurer to issue a title policy.

As maintained by F. M. Cocke throughout the more than five years in the state trial court (April 22, 1969 - September 30, 1974), because of the failure of the Buyers to comply the escrow agreement became

cancelled under paragraph 18 at close of business on March 19, 1969. See Transamerica's March 6, 1969 notice to Buyers that they must comply by March 19, 1969 (A. 88 - 90); Buyers' letter containing their new demands for the extra land and noting the deficiency of $64,000 in their mortgages, received into escrow on March 7, 1969 (A. 91); the separate agreement of November 27, 1972 between Buyers, Transamerica, and Joan H. Cocke that Buyers would at that late date provide additional funds to cover the admitted deficiency (A. 96); and Buyers' letter to Transamerica unsuccessfully demanding that it close the escrow and noting Buyers' deposit of additional funds in January, 1973, in order to comply (A. 99).

As maintained by F. M. Cocke beginning in June, 1969 when he filed his counter and cross claims (with leave of court first obtained to bring in Transamerica) against the other three parties to the escrow agreement, the agreement became cancelled under paragraph 24 on March 10, 1969 by the escrow agent's written notice to Sellers that by Buyers' deposit into escrow on March 7, 1969 of their new demands and deficient mortgages Buyers had complied (A. 95), and by its undisputed announcement on March 20, 1969 that it was unwilling to issue a title policy to Buyers.

III.

FINDINGS

At page 10 of respondents' brief they cite Securities & Exchange Commission v. Frank, 388 F.2d 486 (2nd Cir. 1968) as holding that findings are not a jurisdictional requirement. The case holds only

that findings are not a jurisdictional requirement for appeal. At 493 the court said:

> ". . .the conflicting affidavit, together with the absence of findings, leave us in the gravest doubt just what the district judge thought the facts to be."

And:

> "The judgment is reversed for further proceedings consistent with this opinion."

In United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968), the court at 382 quoted the Advisory Committee for the statements that the findings should represent the judge's own determination and not the statements of successful counsel, and should be a part of the judge's opinion and decision.

Respondents rely on Silberblatt, Inc., v. United States, 353 F.2d 545 (1965), as standing for the proposition that "findings of fact need only be made in sufficient detail. . .to indicate the factual basis for the ultimate conclusion reached by the court" (brief, p. 11). Such reliance is misplaced. The court in Silberblatt said:

> "Findings of fact must be made in sufficient detail and exactness 'to indicate the factual basis for the ultimate conclusion' reached by the court. Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422, 63 S.Ct. 1141, 1145, 87 L.ed. 1485 (1943). . . ."
>
> (emphasis added)

And in footnote 11 added:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. Carr v. Yokohama Specie Bank, Ltd., 200 F.2d 251, 255 (9th Cir. 1952). . . ."

In none of the proceedings, orders or judgments in the state trial court was there any specification under Rule 56d on summary judgments or any findings under Rule 52a on trials to the court on the existence or effect of the cancellation provisions themselves (paragraphs 16 through 25, A. 62-64), or on the existence or effect of the documents listed above at page 13, and included in the Appendix at pages 90, 91, 96, 99 and 95. Rules 52, 56, 16 A.R.S. and Federal Rules of Civil Procedure.

In any event, the ultimate conclusion of the state trial court was that plaintiff Buyers were entitled to specific performance. The facts found which supported this conclusion were: "Cocke has refused to convey the property to Stewart or the Hornes" (A. 112), and "Cocke has refused, and still refuses, to perform the agreement. . ." (A. 122). The facts found were nothing more than conclusions, based on indifference to the actual facts.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 368, 369 (1936), the court said:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In Earle v. McVeigh, 91 U.S. 503, 507, 23 L.ed 398 (1876), the court said:

> ". . .Standard authorities lay down the rule, that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. Borden v. Fitch, 15 Johns. 141.

Respectfully submitted this 25th day of November, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 1975, three copies of the Reply To Responses To The Petition for Writ of Certiorari were hand-delivered or mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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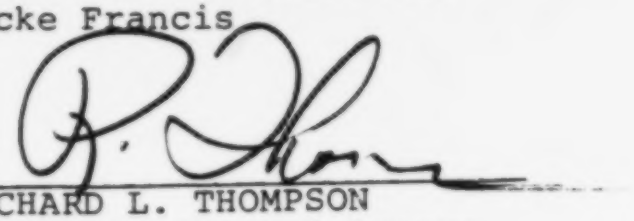

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